

*United States Court of Appeals
for the
District of Columbia Circuit*



**TRANSCRIPT OF
RECORD**

CONSOLIDATED JOINT APPENDIX

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,759

WILLIAM T. MULDROW,

842

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

No. 17,875

JAMES C. and JOHN J. TOOMEY, Trustees,

Appellants,

v.

VIRGINIA WARREN DALY,

Appellee.

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 16 1963

Nathan J. Paulson
CLERK

No. 17,879

SINCLAIR REFINING CO.,

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

APPEALS FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

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CONSOLIDATED JOINT APPENDIX

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JOINT APPENDIX

UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

VIRGINIA WARREN)
Sheraton Park Hotel)
2660 Connecticut Avenue, N.W.)
Washington, D. C.,)
Plaintiff,)
v.) Civil Action No. 1876-59
1. JAMES C. TOOMEY, Trustee u/w)
Ellen C. Toomey, deceased,)
910 - 17th Street, N.W.)
Washington, D. C.)
2. JOHN J. TOOMEY, Trustee u/w)
Ellen C. Toomey, deceased,)
1015 - 15th Street, N.W.)
Washington, D. C.)
3. SINCLAIR REFINING COMPANY,)
a corporation,)
401 Farragut Street, N.W.)
Washington, D. C.)
4. WILLIAM T. MULDROW, t/a)
Muldrow's Auto Service)
706 V Street, N.W.)
Washington, D. C.)
5. RADIO FLASH CAB ASSOCIATION,)
INC., a corporation,)
448 New York Avenue, N.W.)
Washington, D. C.,)
Defendants.)

DOCKET ENTRIES

Date 1959

Proceedings

July 10 Complaint, appearance filed
July 10 Summons, copies (5) and copies (5) of Complaint issued Ser 1, 3 & 5 7/14/59. Ser #4 7/15/59. Ser #2 7/27/59.

<u>Date</u>	<u>Proceedings</u>
<u>1959</u>	
July 28	Motion of deft #5 to drop deft; P&A; affi; c/m 7/28/59; c/m 8-7-59 M.C. 7/28/59; app John J. Spencer, Jr. filed.
July 30	Answer of deft #3; cross-claim v. defts 1, 2, & 4; c/m 7/29/59; app Hogan & Hartson for deft #3. filed.
July 30	Notice by deft #3 to take deposition of pltf; c/m 7/29/59 filed.
Aug. 5	Answer of pltf to motion of deft #5 to drop deft; c/m 8/4/59. filed.
Aug. 19	Motion of defts #1 & #2 to dismiss complt and cross-claim of deft #3; P&A; c/m 8/17/59. M.C. 8/19/59 filed.
Aug. 20	Motion of deft #3 to dismiss complt or for judgment on pleadings; c/m 8/20/59; P&As; M.C. 8/20/59.
Aug. 20	Memorandum of P&As of deft #3 in opposition to defts' 1 and 2 motion to dismiss cross-claim of deft #3; c/m 8/20/59 filed.
Aug. 21	Supplemental P&A of deft #3 in support motion to dismiss; c/m 8/21/59; ex A. filed.
Aug. 25	Stipulation extending time for deft #4 to answer to 9/15/59. McGarraghy, J.
Sep. 15	Answer of pltff to motion to dismiss; P&A c/m 9-14-59 filed.
Sep. 23	Answer of deft #4 to complaint and to cross claim of deft #3 and cross-claim vs. defts #1, 2 & 3; App Welch, Daily & Welch filed.
Sep. 23	Opposition of deft #4 to motions of #1, 2, & 3 to dismiss, c/m 9-23-59 filed.
Sep. 28	Supplemental Points and Authorities of deft #4 in opposition to motion to dismiss; c/m 9-25-59 filed.
Sep. 30	Answer of deft #3 to cross claim of deft #4; c/m 9-30-59 filed.
Oct. 9	Answer of defts 1 and 2 to complaint; c/m 10-8-59; App Whiteford, Hart, Carmody & Wilson filed.
Oct. 9	Answer of defts 1 and 2 to cross claim of deft 3; c/m 10-8-59 filed
Oct. 9	Cross claim of defts 1 and 2 vs. defts 3 and 4; c/m 10/8/59 filed.
Oct. 9	Answer of defts 1 and 2 to cross claims of deft 4; c/m 10-8-59 filed.
Oct. 12	Order granting motion of Radio Flash Cab Assn for summary judgment and denying motion of defts Toomey, Trustees, to dismiss complaint as against them and all other motions presently outstanding, including motion of deft Sinclair Refining Co. to dismiss the complaint as to it and respective motions of

<u>Date</u>	<u>Proceedings</u>	Micro 10/13/59
<u>1959</u>		
Oct. 12 (cont'd)	defts Toomey and Sinclair Refining Co. to dismiss respective cross claims against each other, have been withdrawn by oral statement of counsel in open Court Oct 5, 1959 (N) Holtzoff, J.	
Oct. 15	Answer of deft Sinclair Refining Co. to cross claim of defts; James C. Toomey and John J. Toomey; c/m 10-14-59 filed.	
Oct. 22	Answer of deft #4 to cross claim of defts #1 & #2; c/m 10/21/59.	
Oct. 22	Calendared (AC/N)	
Dec. 3	Notice by deft #3 to take deposition of pltff c/m 12-2-59 filed.	
<u>1960</u>		
Jan. 5	Deposition of pltff.; 12-15-59 (\$58.50 paid by deft.)	filed.
Feb. 2	Appearance of Craighill, Aiello & Preston & Murray Preston withdrawn & enter appearance of Craighill, Aiello & Craighill for pltff.	filed.
May 25	Called.	Pretrial Examiner.
June 23	Deposition of Virginia Lee Riley 6-7-60 (\$76.00 paid by defts)	filed.
Oct. 25	First notice under Rule 13.	
Nov. 30	Motion by pltff to reinstate cause & place on ready calendar; notice; P&A's; Affidavit; c/m 11-30-60; M.C. 11-30-60 filed.	
Nov. 30	Appearance Laskey and Laskey, attorney for plaintiff. (AC/N)	filed.
Dec. 16	Depositions of Robert V. Smith & Wm. H. Lawrence by defts June 8, 1960 (\$116.60)	filed.
<u>1961</u>		
Jan. 9	Consent order reinstating cause. (AC/N) (N) Matthews, J.	
Jan. 23	Motion of defts. 1 & 2 for summary judgment on cross claim of deft. #3; P&A; Exh.; c/m 1/19/61. M.C. 1/23/61.	
Jan. 31	Memorandum of P&A's by deft. #3 in opposition to motion of defts for summary judgment; c/m 1/31/61	filed.
Feb. 7	Opposition of deft #4 to motion to dismiss cross-claim; c/m 2/7/61	filed.
Mar. 10	Motion of Sinclair Refining Co. for summary judgment dismissing cross-claim argued and taken under advisement (Rep: B.L. Anderson)	Walsh, J.

<u>Date</u>	<u>Proceedings</u>	
<u>1961</u>		
Mar. 20	Order denying motion of defts. James C. Toomey and John J. Toomey, Trustees under will of Ellen C. Toomey, dec'd, for summary judgment (N)	Walsh, J.
Apr. 10	Certificate of Readiness (AC/N)	filed.
<u>1962</u>		
Jan. 31	Pretrial Proceedings	Pretrial Examiner.
Apr. 3	List of witnesses to be called by pltff. c/m 4-2-62	filed.
Apr. 11	List of witnesses to be called by deft. Sinclair. c/m 4-10-62.	filed.
Apr. 12	List of witnesses of defts 1 and 2; c/m 4-10-62.	filed.
Apr. 13	List of witnesses per deft #4; c/m 4-12-62.	filed.
Apr. 25	Supplemental list of witnesses by deft; c/m 4-24-62.	filed.
May 8	Supplemental witness list of pltff.; c/m 5-7-62.	filed.
May 15	Order amending caption to have Plaintiff's name read "Virginia Warren Daly" instead of Virginia Warren. (N)	Jones, J.
Oct. 17	Consent order postponing trial to November 26, 1962 or first available date. (AC/N) (N)	Tamm, J.
Nov. 26	Jury and two alternate jurors sworn; trial respite until Nov. 27, 1962 (Rep: E. Romig)	Pine, J.
Nov. 27	Trial resumed; same jury & alternate jurors; respite until Nov. 28, 1962. (Rep: R. Frye)	Pine, J.
Nov. 28	Trial resumed; same jury & alternate jurors; respite until Nov. 30, 1962. (Rep: R. Frye)	Pine, J.
Nov. 30	Trial resumed; same jury & alternate jurors; respite until Dec. 3, 1962. (Rep: Roger Frye)	Pine, J.
Dec. 3	Trial resumed; same jury & alternate jurors; alternate jurors discharged; jury excused until Dec. 4, 1962 to resume deliberations. (Rep: E. Romig)	Pine, J.
Dec. 4	Jury resumes deliberations; jury excused for further deliberations until Dec. 5, 1962. (Rep: Roger Frye)	Pine, J.
Dec. 5	Jury resumes deliberations; verdict for the pltff. vs. defts. in the sum of \$17,000.00. (Rep: Roger Frye)	Pine, J.
Dec. 5	Verdict & Judgment for the plaintiff vs. defts. in the sum of Seventeen-Thousand Dollars (\$17,000.00). (N)	Pine, J.
Dec. 5	Memorandum of P&A by deft. #3.	filed.

<u>Date</u>	<u>Proceedings</u>	
<u>1962</u>		
Dec. 5	Instructions of pltff. & defts.	filed.
Dec. 5	Notes from jury.	filed.
Dec. 10	Transcript of proceedings, pp 1-27; Dec. 3, 1962. (Rep: Edna B. Romig) Clerk's copy.	filed.
Dec. 14	Motion by defts. to set aside verdicts and judgments and to enter judgments in favor of defts., or in the alternative for a new trial, P&A, c/m 12-14-62 MC 12-14-62.	filed.
<u>1963</u>		
Jan. 2	Memorandum of P&A in opposition to defts. motion to set aside verdicts & judgments and judgment in favor of defts. in accordance with their motions for directed verdicts, or in the alternative for a new trial, c/m 1-2-63	filed.
Jan. 10	Memorandum opinion denying defendants motion to set aside verdicts and to enter judgment in favor of defendants; and for remittitur within 10 days of that amount above \$12,000.00 (N)	Pine, J.
Jan. 10	Order denying motion of defendants to set aside Verdicts and Judgments and to enter judgments in favor of defendants; if plaintiff files a remittitur, within ten days, of that part of verdict and judgment in excess of \$12,000.00, motion of defendants for new trial will be denied, otherwise motion will be granted. (N)	Pine, J.
Jan. 16	Remittitur of pltff. in sum of \$5,000.00 by pltff. per order of 12-5-62.	filed.
Jan. 29	Transcript of Official Court Reporter, Roger E. Frye, Nov. 27, 1962 pgs. 1-18, Court's Copy.	filed.
Jan. 29	Transcript of Official Court Reporter, Roger E. Frye, Nov. 27, 1962 pgs. 1-28, Court's Copy.	filed.
Jan. 29	Transcript of Official Court Reporter, Roger E. Frye, Dec. 4, 5, 1962 pgs. 1-27, Clerk's Copy.	filed.
Jan. 29	Excerpts of transcript of testimony, 6 pages.	filed.
Jan. 30	Stipulation of counsel for deft., Sinclair and deft., Muldrow, that deft., Sinclair may withdraw its contractual claim for full indemnity against deft., Muldrow & assert only its claim for contribution; c/m 1-29-63.	filed.
Jan. 30	Withdrawal by deft., Sinclair of claim against deft., Muldrow for indemnity based upon contract pursuant to stipulation filed 1-30-63.	filed.

Date
1963

Proceedings

Jan. 30 Findings of Fact & Conclusions of Law (signed 1-29-63) (N) Pine, J.

Jan. 30 Judgment for contribution for defts., James C. & John J. Toomey from defts., Sinclair and Muldrow, in equal amounts of any sums which defts., Toomey pay in satisfaction of the judgment herein which shall be in excess of One-Third of said judgment; for deft., Sinclair from defts., Toomey & from deft., Muldrow in equal amounts of any sums which deft., Sinclair shall pay in satisfaction of the judgment herein which shall be in excess of One-Third of said judgment; for deft., Muldrow from defts., Toomey & Sinclair in equal amounts of any sums which deft., Muldrow shall pay in satisfaction of the judgment herein which shall be in excess of One-Third of the judgment; denying cross-claim of deft., Sinclair for indemnity against defts., Toomey & dismissing said cross-claim. (signed 1-29-63) (N) Pine, J.

Jan. 31 Bill of costs as verified by John L. Laskey. filed.

Feb. 2 Costs taxed for plaintiff in amount of \$75.50 (N) filed.

Feb. 25 Notice of appeal by Sinclair Refining Co. from order Jan. 30, 1963, copy to Harry Ryan \$5.00 deposit by J. Arness. filed.

Feb. 27 Notice of appeal by William T. Muldrow from order 12-25-62. Copies to Laskey, Arness & Ryan. \$5.00 deposit by H.M. Welch. filed.

Mar. 1 Notice of appeal by James C. & John J. Toomey from order of 12/5/62. Copies to Laskey, Arness & Welch. \$5.00 deposit by H. Ryan. filed.

Mar. 1 Notice of appeal by Sinclair Refining Co. from order of 12/5/62. Copies to Laskey, Ryan and H. M. Welch. \$5.00 deposit by J. Arness. filed.

Mar. 8 Cost bond on appeal in sum of \$250.00 with Travelers Indemnity Co. approved by Jones, J.

Mar. 8 Statement of points on appeal, c/m 3-8-63. filed.

Mar. 8 Transcript of proceedings Dec. 4 & 5, 1962, pp. 1-27 (Rep. R. Frye) Court's copy. filed.

Mar. 8 Transcript of proceedings Nov. 28 & 30, 1962, pp. 1-37 (Rep. R. Frye), attorneys copy, filed.

Mar. 8 Transcript of proceedings 12-3-62, pp. 1-27 (Rep. Edna Romig) filed.

Mar. 8 Transcript of proceedings 1-25-63, pp. 1-28 (Rep. E.M. Sanchez) filed.

Date
1963

Proceedings

Mar. 8 Transcript of proceedings 1-25-63, pp. 1-28, (Rep. E. M. Sanche), court's copy. filed.

Mar. 16 Cost bond on appeal by Sinclair Refining in sum of \$250 with Travelers Indemnity Co., approved. Jones, J.

[Filed July 10, 1959]

COMPLAINT FOR PERSONAL INJURY

1. This Court has jurisdiction of this case under Section 11-306 of the District of Columbia Code, because it is a civil action in which the amount in controversy exceeds \$3,000, exclusive of interest and costs.

2. The defendants numbered 1 and 2, James C. Toomey and John J. Toomey, on the date when plaintiff was injured, were trustees under the will of Ellen C. Toomey, deceased, and as such the owners of real property in the District of Columbia, designated 706 V Street, N.W., where the plaintiff suffered the injury which is the subject of this complaint, and said defendants leased said property to defendant numbered 3.

3. The defendant numbered 3, Sinclair Refining Company, a corporation which, as lessee of said real property, 706 V Street, N.W., on the date when the plaintiff was injured, operated a gasoline filling station business upon the premises, which business included an automobile parking business.

4. The defendant numbered 4, William T. Muldrow, under an agreement between him and said Sinclair Refining Company, on the date when plaintiff was injured, operated for said company the aforesaid business on said premises, being for certain purposes the agent or employee of said company and for other purposes an independent contractor with said company.

5. The defendant numbered 5, Radio Flash Cab Association, Inc., is a corporation which, under a rental agreement with one or more of the

other defendants, on the date when plaintiff was injured, had an office and conducted a taxicab business upon the said premises.

6. The defendants, or one or more of them, on the night of June 12, 1958, and for a period of time previous to that date but of unknown duration, negligently maintained an unlighted and unguarded stairwell on the west side of the building at 706 V Street, N.W., leading down from the ground level to a basement office. The said stairwell was immediately adjacent to a public alley. The defendants and each of them knew, or in the exercise of reasonable judgment and care should have known that said stairwell in said condition and location constituted an unreasonable danger to persons lawfully passing in the vicinity of said stairwell.

7. Because of the said negligence of the defendants, or of one or more of them, plaintiff fell into said stairwell on the night of June 12, 1958, while lawfully and with reasonable care passing near said stairwell, and was injured in said fall, as set forth below.

8. In falling into said stairwell, plaintiff suffered a very severe trimalleolar fracture of the right ankle, with posterolateral dislocation. Said fracture has still not united perfectly, and plaintiff for that reason is still suffering from residual pain and partial disability in said ankle and will continue so to suffer in the indefinite future.

9. Because of said injury, the plaintiff suffered great pain and disability over a long period of time. She was hospitalized for one week, and confined to her home thereafter with a cast upon her leg until September 3, 1958. As a direct result of said injury, the plaintiff was forced to incur, among other expenses, hospital bills of \$170.94 and doctors' bills of \$290.

WHEREFORE, the plaintiff demands in judgment against any one or all of the defendants liable to her the sum of \$50,000 and the costs of this suit.

Plaintiff demands a trial by jury of all of the issues in this case.

CRAIGHILL, AIELLO & PRESTON

By /s/ Murray Preston
Attorney for Plaintiff
901 Folger Building
Washington 5, D. C.

COLES & GOERTNER

By /s/ Marvin Coles
Of Counsel for Plaintiff
1000 Connecticut Avenue, N.W.
Washington 6, D. C.

[Filed July 30, 1959]

**ANSWER OF SINCLAIR REFINING COMPANY TO
COMPLAINT AND CROSS-CLAIMS AGAINST
DEFENDANTS JAMES C. TOOMEY,
JOHN J. TOOMEY AND WILLIAM T. MULDROW**

First Defense

The complaint fails to state a claim against this defendant upon which relief can be granted.

Second Defense

1. Defendant, Sinclair Refining Company, admits that it entered into a lease agreement with James C. Toomey and John J. Toomey, as substituted trustees of the Estate of Ellen C. Toomey, deceased, lessors, on September 13, 1956, and thereby became lessees of a certain portion of the premises at 704 - 706 V Street, N. W.

2. It further admits that on December 5, 1957 it subleased those premises to William T. Muldrow. Any decision with reference to the relationship of the parties defendant 1, 2, 3 and 4 will have to be made with reference to the terms of the lease agreements executed under the dates aforesaid.

3. Defendant, Sinclair Refining Company, has no knowledge or information which is sufficient to form a belief with respect to the truth

of the allegations concerning the occurrence complained of; the status of the plaintiff; or the injuries and damages which were sustained, if any; and, therefore, demands strict proof of the pertinent allegations of the complaint.

4. Defendant, Sinclair Refining Company, denies that there was any defective or dangerous condition maintained on the premises. It further denies that plaintiff was injured by reason of negligence attributable to it or by reason of any breach of duty on its part. It further denies each and every other material allegation of the complaint which is not herein specifically answered.

Third Defense

The injuries and damages sustained, if any, were the result of the sole or contributory negligence of the plaintiff, Virginia Warren.

CROSS-CLAIM AGAINST DEFENDANTS, JAMES C. TOOMEY AND JOHN J. TOOMEY, TRUSTEES

The accident which forms a basis for plaintiff's claim allegedly occurred in the District of Columbia on premises designated as 706 V Street, N.W., on June 12, 1958, when plaintiff fell into a stairwell which according to the allegations of the complaint "constituted an unreasonable danger to persons lawfully passing in the vicinity of said stairwell." Defendant, Sinclair Refining Company, denies the plaintiff's allegations. However, if the accident occurred as alleged and for the reasons asserted, it was caused or contributed to by the negligence and carelessness of defendants James C. Toomey and John J. Toomey, or their agents, servants or employees, who, as owners of the property, were responsible for the construction of the premises, the structural condition of the premises, and the maintenance thereof. If the defendant, Sinclair Refining Company, by virtue of its relationship to the plaintiff, or any of the parties herein, is held liable for all or any part of the injuries allegedly sustained, such liability will have been caused or contributed to by the aforesaid negligence of the defendants James C. Toomey and John J. Toomey. By virtue of the negligence aforesaid and by virtue of the

relationship between the defendants Toomey and this defendant and of the contractual provisions of the lease entered into on September 13, 1956, those defendants are or may be answerable over to this defendant for all or a contributable portion of any sums which may be adjudged in favor of the plaintiff against the Sinclair Refining Company in this action.

WHEREFORE, defendant, Sinclair Refining Company, demands judgment against defendants James C. Toomey and John J. Toomey for all or a contributable portion of any sum which may be adjudged in favor of plaintiff against Sinclair Refining Company in this action together with interest, costs and all other further and proper relief in the premises.

CROSS-CLAIM AGAINST DEFENDANT
WILLIAM T. MULDROW

The action which forms a basis for plaintiff's claim allegedly occurred in the District of Columbia on premises designated as 706 V Street, N.W., on June 12, 1958, when plaintiff fell into a stairwell, which, according to the allegations of the complaint, was unlighted and unguarded, negligently maintained, and unreasonably dangerous. Defendant Sinclair Refining Company denied the plaintiff's allegations. However, if the accident occurred as alleged and in the manner asserted, it was caused or contributed to by the negligence and carelessness of defendant, William T. Muldrow, his agents, servants or employees. If the defendant, Sinclair Refining Company, by virtue of its relationship to the plaintiff is held liable for all or any part of the injuries allegedly sustained, such liability will have been caused or contributed to by the aforesaid negligence of William T. Muldrow. By reason of the negligence aforesaid and by reason of the contractual provisions of the lease between this defendant and William T. Muldrow, which, *inter alia*, provides that William T. Muldrow will indemnify and save harmless the Sinclair Refining Company from any and all claims which arise by reason of the occupancy of the leased premises, the said William T. Muldrow is or may be answerable over to this defendant for all or a contributable portion of any sums which may be adjudged in favor of the plaintiff against the Sinclair Refining Company in this action.

WHEREFORE, defendant, Sinclair Refining Company, demands judgment against defendant William T. Muldrow for all or a contributable portion of any sum which may be adjudged in favor of plaintiff against Sinclair Refining Company in this action together with interest, costs and all other further and proper relief in the premises.

HOGAN & HARTSON

By /s/ John P. Arness
Attorneys for Defendant
Sinclair Refining Company
810 Colorado Building
Washington, D. C.

[Certificate of Service]

[Filed Sept. 23, 1959]

**ANSWER OF WILLIAM T. MULDROW TO PLAINTIFF'S
COMPLAINT AND ANSWER TO CROSS-CLAIMS OF
DEFENDANT SINCLAIR REFINING COMPANY AND
DEFENDANT MULDROW'S CROSS-CLAIMS AGAINST
DEFENDANTS TOOMEY AND SINCLAIR REFINING
COMPANY**

Comes now defendant William T. Muldrow by his counsel and for answer to plaintiff's complaint states:

FIRST DEFENSE

The complaint fails to state a cause of action upon which relief may be granted [as] to this defendant.

SECOND DEFENSE

1. Defendant admits the jurisdiction of the Court.
2. Defendant admits the allegations of paragraph #2 of the complaint.
3. This defendant neither admits or denies the allegations of paragraph #3 of the complaint and demands strict proof thereof.
4. This defendant admits that he leased the premises, concerned with the subject matter of plaintiff's complaint, from Sinclair Refining

Company under written lease dated December 5, 1957.

5. Defendant denies the allegations of paragraph #5 of the complaint.

6. This defendant admits that there was a stairway at the east end of the building at 706 V Street, N.W., leading from the ground level to a basement; that the top ^{or} ~~from~~ ground level of said stairway was close to a public alley, on the west thereof. This defendant denies that said stairway was unlighted. This defendant denies that said stairway constituted an unreasonable danger as alleged.

This defendant admits that said stairway was not enclosed by a railing or other guard but denies that under the circumstances and conditions prevailing at the time of plaintiff's alleged fall that said stairway constituted a danger, as alleged by plaintiff, and denies that it was the duty of this defendant, in any event, to erect a guard rail or other protective device on or about said stairway inasmuch as said stairway at the time of the grievances complained of in plaintiff's complaint was in the precise condition as when defendant took over said premises under the terms of its lease with defendant Sinclair which in turn was the lessee from the owner defendants Toomey. It was neither the obligation nor duty of this defendant to change or add to the structural condition of the premises as the same were received by this defendant.

7 and 8. This defendant denies the allegations of paragraphs #7 and #8 of plaintiff's complaint, except that defendant admits that plaintiff sustained a fall at said stairway. If plaintiff was injured as alleged in said complaint this defendant demands strict proof thereof.

9. This defendant denies the allegations of paragraph #9 and demands strict proof thereof.

THIRD DEFENSE

This defendant denies that plaintiff sustained the fall and injuries as alleged in plaintiff's complaint by reason of any negligence on the part of this defendant and avers (1) that plaintiff at the time of her

alleged fall was a trespasser on the premises managed and operated as a gasoline station by this defendant; that said plaintiff was not an invitee on said premises, and (2) that said stairway at the time of plaintiff's alleged fall was adequately and properly lighted and readily observable to any person exercising reasonable care and lookout and that plaintiff's alleged fall was entirely the result of her own carelessness and negligence or negligence and carelessness on her part directly contributing to said fall.

**CROSS-CLAIM OF DEFENDANT
SINCLAIR -- ANSWER**

Defendant Sinclair Refining Company, a corporation, in its answer to plaintiff's complaint asserted a cross-claim against this defendant. This defendant denies that in any event it legally is answerable to said Sinclair Refining Company, a corporation, and avers that this defendant is under no duty or obligation to change the structural condition of the premises concerned after receiving possession of same under its lease with said Sinclair Refining Company. That the condition of said stairway, without stair rail or other guarding device, at the time of plaintiff's alleged accident was precisely as the premises were received by this defendant from Sinclair Refining Company and this defendant is informed and believes that said stairway was in the same condition when received by said Sinclair Refining Company from defendants Toomey. This defendant denies that the terms of its lease with said Sinclair Refining Company contemplates or requires this defendant to make any structural changes to the premises.

Wherefore this defendant prays that the cross-claim asserted by co-defendant Sinclair Refining Company, a corporation, be dismissed.

**CROSS-CLAIMS OF DEFENDANT MULDROW
AGAINST DEFENDANT TOOMEY
AND TOOMEY AND SINCLAIR**

The defendant Muldrow for cross-claim against defendants James C. Toomey and John J. Toomey, trustees and Sinclair Refining Company, a corporation, says:

1. That defendants Toomey and Toomey are the owners of the premises involved in plaintiff's complaint and Sinclair Refining Company, a corporation, is the direct lessee of said premises from defendants Toomey and Toomey. Defendant Sinclair subleased said premises to this defendant Muldrow.

2. This defendant was and is under no obligation to make structural changes in the premises as they were received by this defendant in the lease chain from defendants Toomey and Toomey through Sinclair. The stairway involved herein and referred to in plaintiff's complaint was without stair rail or protective devices when possession of the premises passed by lease from defendants Toomey and Toomey to defendant Sinclair and in turn from defendant Sinclair to this defendant.

3. Said defendants Toomey and Toomey and Sinclair cannot under the circumstances of this case escape or defeat their direct responsibility ^{to} through the plaintiff for conditions which prevailed at the time of plaintiff's alleged fall resulting from the structural condition of said premises.

4. This defendant says, if plaintiff's fall resulted from the faulty construction of said stairway without a railing or other protective device, as alleged by plaintiff, then such fault and neglect was entirely and solely the responsibility of defendants Toomey and Toomey and Sinclair.

Wherefore this defendant, William T. Muldrow, claims that said defendants Toomey and Toomey and Sinclair are answerable over to this defendant for all or a contributable portion of any sums which may be adjudged in favor of the plaintiff against this defendant.

WELCH, DAILY & WELCH

By /s/ H. Mason Welch
Attorneys for defendant
William T. Muldrow
505 Investment Building
Washington, D. C.

[Certificate of Service]

[Filed October 9, 1959]

**ANSWER OF DEFENDANTS JAMES C.
TOOMEY AND JOHN J. TOOMEY,
TRUSTEES, TO PLAINTIFF'S COMPLAINT**

First Defense

Plaintiff's complaint fails to state a claim against these defendants upon which any relief can be granted.

Second Defense

These defendants admit jurisdiction of this court and admit that they were, on June 12, 1958, trustees under the will of Ellen C. Toomey, deceased, and as such were owners of premises 706 V Street, N.W. These defendants further admit that said premises were at such date by them then leased to defendant Sinclair Refining Company in and by virtue of a lease agreement dated September 13, 1956.

These defendants are without information, knowledge or belief concerning the alleged subletting of defendants' property but aver that subletting thereof was permitted in their lease agreement with defendant Sinclair Refining Company provided that the use or occupancy of the property of these defendants by any subtenant thereof would conform in every particular to the covenants contained in the lease between these defendants and defendant Sinclair Refining Company.

These defendants deny each and every allegation of negligence pertaining to them and deny that they were under any obligation to maintain the premises herein in repair during the occupancy thereof by defendant Sinclair Refining Company or any subtenant.

These defendants further deny that the plaintiff herein suffered or sustained any injury upon any premises over which they had any active dominion or control insofar as maintenance is concerned and deny that plaintiff suffered or sustained any injury by reason of any negligence attributable to them or by any breach of duty owed by them to plaintiff. Said defendants further deny each and every other material allegation of plaintiff's complaint not heretofore specifically answered.

Third Defense

These defendants aver that any injuries or damages sustained by plaintiff herein were as a result of her sole or contributory negligence.

Fourth Defense

These defendants aver that if plaintiff herein suffered or sustained any injuries upon the property allegedly owned by these defendants, that plaintiff's presence upon such premises was not as a result of any invitation of these defendants to plaintiff nor was the same for any purpose, use or business incidental to the ownership of said premises by these defendants and that any presence upon said premises by the plaintiff was for her own use and purpose as a result whereof plaintiff took said premises in the condition in which she found them and assumed for herself any and all injuries and damages which she might have sustained while thus upon said premises. These defendants aver that they were not in occupancy, use or active control of the premises at the time plaintiff allegedly sustained her injuries thereupon.

WHITE FORD, HART, CARMODY &
WILSON

By /s/ Harry L. Ryan, Jr.
815 Fifteenth Street, N.W.
Washington 5, D.C.
Attorneys for Defendants Toomey

[Certificate of Service]

[Filed Jan. 31, 1962]

PRETRIAL PROCEEDINGS

Tort for personal injuries.

PLAINTIFF CLAIMS on June 12, 1958 at about 10:30 PM, following a night baseball game, the P, then 31 years of age, in company of an escort, was lawfully proceeding along a public alley running from V St. to Florida Ave., N.W., Wash., D.C. at the side of premises known as 706

V St., N.W. Said property was owned by the Ds James C. and John J. Toomey as trustees, was leased by D Sinclair Refining Co. from them, and in turn sub-leased to D William T. Muldrow. The D Radio Cab has been dismissed from the case.

The P, while traversing the alley, fell in a stairwell of said premises and was injured as indicated below. The alley was immediately adjacent to the Ds' premises and there was no boundary, property line, fence or other instrument of division demarking the end of the public alley and the beginning of Ds' property.

P asserts that the accident, her injuries and damages were caused by the negligence of all the Ds in that they maintained an unlighted stairwell under circumstances reasonably requiring lighting; maintained an unguarded stairwell; maintained an uncovered stairwell immediately adjacent to a public way without notice or warning sign; failed to mark the dividing line between the public space and the Ds' property, so that those persons lawfully using the public way would be apprised of the dividing line, and thus be warned that apparently a part of the public way was not in fact maintained and fit for use as a public way; maintained a hazardous condition, constituting a latent and concealed defect, to wit, the stairwell.

PLAINTIFF'S INJURIES

Severe trimalleolar fracture of the right ankle, with posterolateral dislocation; various bruises; contusions and abrasions.

Permanent Injury: Lipping at the site of the fractures; post traumatic arthritis in the ankle.

SPECIAL DAMAGES

Dr. Leonard T. Peterson, \$425.00; Drs. Groover, Christie & Merritt, \$20.00; The George Washington University Hospital, \$284.49. Total specials, \$729.49.

DEFENDANTS TOOMEY assert that they were, on and prior to the date in question, substituted trustees under the will of Ellen C. Toomey, deceased, and premises 706 V St., N.W., constituted an asset of said decedent's estate for which said Ds were trustees; on Sept. 13, 1956, these Ds leased premises in question together with other properties to D Sinclair Refining Co; said lease was for 5 years and was outstanding and in effect on June 12, 1958, when P herein was allegedly injured; these Ds have no actual knowledge of the happening.

The lease between these Ds and Sinclair limited the use and occupancy of said premises to the sale of gasoline, oils, greases, tires, batteries, automobile repairs and provided that Sinclair might sublet for like purposes and subject to all covenants of the lease, that the lessee would make all repairs of any nature necessary to the premises excepting the roof, walls, foundations, sewer and water lines.

Full, complete control, supervision, operation and possession of the premises concerned was in either Sinclair Refining Company or one of its subtenants at the time of the alleged happening of which P complains.

These Ds deny any responsibility to P for any injury sustained by P upon Ds' premises, asserting that P was a trespasser, or at best a bare licensee taking the premises as she found them, that there was no active negligence on their part, that they were under no duty to maintain the premises nor did they have nor should they have had any notice of any dangerous or defective condition allegedly existing thereupon, and that said defendants were at the time of the happening neither in occupancy, use or active control of the premises.

These Ds further rely upon P's sole or contributory negligence in defense to this action, in that she walked down the alley around parked cars, failed to keep a proper observance of conditions which existed and were there to be seen; walking fast; P was required to wear eye glasses because of an eye condition, and did not have them on at the time.

In either support of, or in defense of cross-claims asserted herein by and against these Ds, they rely upon the facts and legal positions hereinbefore asserted, and further assert that if P shall establish by her proof

herein any use or occupancy of these Ds premises not authorized or permitted by their lease, that in such situation these Ds are entitled to be exonerated by such users for any judgment which may be awarded P herein against these Ds. Similarly they claim indemnity as passive tortfeasors from the remaining Ds who may be active tortfeasors if any judgment is recovered by P against them or alternatively their contributive share as joint tortfeasors.

DEFENDANT SINCLAIR REFINING CO. denies that complaint states a claim against it upon which relief can be granted because it owed P no duty and she was a trespasser. This D admits it entered into the lease agreement as claimed by Ds Toomey and admits it sub-leased the premises to the D. Muldrow on Dec. 5, 1957; asserts that any decision or interpretation made with reference to the relationship of the parties D must be made with reference to the specific terms of the lease agreements which speak for themselves; demands strict proof of the occurrence, P's status, injuries and damages claimed; denies any defective or dangerous condition maintained on the premises; denies any negligence, asserting that any injuries or damages sustained were the result of the sole or contributory negligence of the P adopting the specific allegations of Ds Toomey in this respect.

This D cross-claims against the Toomeys for the reason that under the allegations of the complaint it is alleged that the stairwell in question ". . . constituted an unreasonable danger to persons lawfully passing in the vicinity of the said stairwell." Ds Toomey as owners of the property were responsible for the construction of the premises, the structural condition of the premises and the maintenance thereof, and if by reason of these allegations any liability is imposed upon Sinclair Refining Co. by virtue of its relationship to P, such liability will have been caused or contributed to by the conduct of the Ds Toomey, which P alleges was negligent conduct. By virtue of such negligence, if proven, and by virtue of the relationship between the Ds Toomey and this D and of the contractual provisions of the lease, these Ds are, or may be answerable over to

this D for all or a contributable portion of any sum which may be adjudged in favor of P.

This D also cross-claims against D. William T. Muldrow, for the reason that P alleges that the stairwell was unlighted, unguarded, negligently maintained and unreasonably dangerous. These allegations are denied by D, Sinclair Refining Co., however, if the accident is proven to have occurred as alleged, and if this D is held liable to P by reason of such allegations and by reason of its relationship to her, such liability will have been caused or contributed to by the negligence of D. William T. Muldrow. Therefore, by reason of such negligence and by reason of the contractual provisions of the lease which requires that D. William T. Muldrow, indemnify and save harmless the Sinclair Refining Co., he is or may be liable over to this D for all or a contributable portion of any sum which may be adjudged in favor of P against Sinclair Refining Co. in this action.

D Sinclair denies the allegations of the cross-claims asserted against it.

DEFENDANT WILLIAM T. MULDROW admits that he was a sub-lessee of said premises at the time of P's fall and had been from Dec. 5, 1957 under a year-to-year lease; claims that the P, at the time of the happening of the incident complained of, was guilty of negligence directly contributed to her alleged fall and resultant injuries and damages, adopting the allegations of the Ds Toomey in this respect; denies that the said stairwell was unlighted and avers that the premises within the operation and control of this D were adequately and reasonably well lighted and that this D had no responsibility or obligation to light a public alley way or other areas; asserts that P was not a business invitee or guest at the premises managed and controlled by this D and that in going upon and walking upon said premises she was a trespasser; that said stairwell referred to in P's complaint was located upon private property and was not a hazard or danger to persons or the P lawfully in and upon and using

said public alley; that he was not the owner of said premises and that he only occupied said premises as a sub-lessee under the lease before mentioned from D. Sinclair Refining Co; that under the terms and provisions of this lease, he had no right, duty or obligation to make alterations or changes as would be comprised in building or erecting guard railings or walls at the stairwell, where P's fall occurred; that the conditions existing at said stairwell at the time of P's alleged fall were exactly and precisely the same as at the time this D took over the occupancy of said premises under the aforesaid lease from Sinclair Refining Company; that Sinclair Refining Company, under the provisions of its lease above-mentioned, with the owners, Ds Toomey and Toomey, was directly responsible with Ds. Toomey and Toomey for the structural hazards of said premises, if any, including the involved stairwell, as may have caused any hazard to persons lawfully in and upon the adjacent public ways and alley; that it was the obligation and legal duty of Ds. Toomey and Toomey, and Sinclair Refining Co. to make such alteration and structural changes as might be necessary, if any, to overcome and correct any hazard which existed and was dangerous to the P and others lawfully using the adjacent public ways and alley.

This D denies that the P was injured and damaged to the extent alleged in P's complaint.

This D seeks to recover for indemnity and/or contribution from the other Ds and in support of said claims and in defense of the cross-claims brought by the other Ds against him asserts that the defect of the premises, if any, was a structural defect, and that this D had no control over the structure as stated hereinabove.

All of the Ds object to the P's claim that their negligence is predicated upon their "failure to mark the dividing line between the public space and the Ds property, so that those persons lawfully using the public way would be apprised of the dividing line, and thus be warned that apparently a part of the public way was not in fact maintained and fit for use as a

public way", asserting that such claim was asserted for the first time at pretrial and this constitutes an amendment of the P's pleadings, which takes the Ds by surprise; that it is too late to advance this claim because of the statute of limitations.

STIPULATIONS

The parties agree to the mutual exchange of all medical reports of examining or treating physicians, now in hand, on or before April 2, 1962, and a similar exchange of all such reports within 48 hours of the alert of this case for trial.

Counsel for P agrees to make the P available for the purpose of a physical examination by physicians of Ds' choice before, but not to interfere with, trial.

The parties agree to the mutual exchange in writing on or before April 2, 1962, of the name(s) and address(es) of witnesses to the accident, to the circumstances surrounding same, and with reference to the nature and extent of injuries and damage, filing a copy thereof on or before said date with the Clerk of the Court.

Counsel for the P has in his possession photographs marked P-1, P-2 and P-3, which he requests be admitted in evidence. D Muldrow has no objection, but the other Ds object.

D Muldrow has in his possession, photographs marked M-1 and M-2 which he requests be admitted in evidence. P has no objections, but the other Ds object.

The following may be admitted in evidence without formal proof: hospital records, provided that prior to trial, counsel for P furnishes Ds with a written authorization from the P which will enable Ds to examine and copy any records; x-ray plates.

All parties agree that the Toomeys, as trustees, owned premises at 706 V St., N.W., Wash., D.C.

The parties agree that lease agreement, marked T-1 by the Examiner, was in effect between Ds Toomey and Sinclair Refining Co. at the time of the accident.

The parties agree that lease agreement, marked S-1 by Examiner, was in effect between Sinclair and Muldrow at the time of the accident.

TRIAL COUNSEL: John L. Laskey, Esq. for the Plaintiff; Harry L. Ryan, Jr., Esq. for the Ds Toomey; Mason Welch, Esq. for D Muldrow; John P. Arness, Esq. for Sinclair.

The Examiner has requested counsel for Ds to appear at trial with the maximum amount of authority to settle this case which will be allowed him by his principal.

/s/ John L. Laskey	Counsel for Plaintiff
/s/ Harry L. Ryan, Jr.	Counsel for Ds Toomey
/s/ Walter J. Murphy, Jr.	Counsel for D Muldrow
/s/ John Arness	Counsel for Sinclair Refining Co.

/s/ John J. Finn
PRETRIAL EXAMINER

EXCERPTS FROM TRANSCRIPT OF PROCEEDINGS

1

Washington, D. C.,
Monday, November 26, 1962.

The above-entitled cause came on for trial before THE HONORABLE DAVID PINE, United States District Judge, and a jury, at 10:04 a.m.

* * * * *

4

Thereupon

VIRGINIA WARREN DALY

DIRECT EXAMINATION

BY MR. LASKEY:

* * * * *

Q. Would you state your name, please. A. Virginia Warren Daly.

* * * * *

5 Q. On the evening of June 12, did you have a social engagement with anyone? A. Yes, I did.

Q. And who was that? A. Mr. William Lawrence.

Q. And had you known him long? A. Yes; quite some time.

6 Q. And what was your activity that evening? A. We went to dinner at Ted Lewis' Restaurant and then went to the ball game at Griffith Stadium.

* * * * *

Q. How did you get from the restaurant where you had dinner to the ball park? A. We drove in Mr. Lawrence's car.

Q. And who drove? A. Mr. Lawrence.

Q. And at what place did you leave the car? A. We left the car in the Sinclair oil station.

* * * * *

Q. Will you describe the place where you left the car and, to the best of your recollection, where you left the car and what happened to the car, if you know?

* * * * *

7 A. As I recall, we drove into the service station and where cars were being parked, I got out of the car. We stopped the car. I got out of the car. And I waited at the spot where I got out of the car for Mr. Lawrence. I did not go to where the car was parked. There was general activity in the station, as we pulled in.

Q. Did Mr. Lawrence later join you? A. Yes, he did.

Q. And from there you went on to the ball game; is that correct?

A. To the ball game, yes.

Q. Did you observe at that time an alley next to or near the Sinclair station? A. Yes.

Q. And where was that alley with respect to where you got out of the car? A. As I recall, we had to turn into an alley to get into the station.

Q. And how far did the car go from the street before you reached the place where you got out? A. Perhaps the length of a car, maybe a little bit more.

8 Q. And then you went on and attended the game?

MR. ARNESS: Excuse me, Your Honor. At this point I move to strike the conclusion of Mrs. Daly that the car was parked at the station inasmuch as she had not testified it was stopped in the alley and she did not see where it went from there.

MR. LASKEY: I don't recall, Your Honor, she said where it was stopped.

THE COURT: Overruled.

MR. WELCH: On behalf of Mr. Muldrow I wish to make the same motion, because she specifically said we parked it in the Sinclair parking station and now she has specifically said that she didn't know where it was parked; she got out of it in an alley.

THE COURT: That is a matter for the jury, and you can take it up further on cross-examination.

BY MR. LASKEY:

Q. Do you recall the location of the car with respect to its being on the Sinclair filling station or the alley itself at the time? A. No.

* * * * *

9 Q. Did Mr. Lawrence drive the car on after you got out, or did he turn it over to someone else, if you know? A. I don't recall that. I know that I got out and waited for Mr. Lawrence. Whether it was turned over to an attendant or what Mr. Lawrence did, I don't recall.

* * * * *

Q. And what time was it approximately that you got there? A. Approximately eight o'clock, I would think.

Q. And did you stay through the game? A. Yes.

Q. And when the game was over you left and returned to your automobile, or to where Mr. Lawrence's automobile was left? A. Yes.

Q. Will you describe the route you took as you came toward the place where you had left your car? A. From the stadium?

Q. Yes. We don't have to have a step by step account but just
10 briefly how you got from the stadium to the place where the car had been left. A. Yes. We walked across the street to the gas station; on the sidewalk, as I recall, alongside the gas station; we made a left turn onto the premises and proceeded down the alley.

Q. You were walking in the alley? A. I don't remember exactly whether we crossed some other property to the alley or not. But as I approached the area of the accident we were walking down the alley.

Q. What was the condition of traffic in the alley at the time you started down it? A. There were cars coming towards us, as I recall, and many pedestrians.

Q. The cars coming toward you were coming from where? A. Coming from the other end of the alley. I don't know --

Q. They were approaching the street, going in the opposite direction in which you were? A. Yes; that is right.

Q. Will you tell us from that point forward to the best of your recollection what happened. A. We proceeded down in the direction towards where our car was parked. I seem -- I recall a car parked near the edge
11 of the building.

Q. Facing you? A. I don't remember whether the car was facing us or not. Traffic was coming down on the right side of that car. We moved to the left to go down a passageway between the parked car and a building.

Q. When you moved to the left were you walking abreast or single file? A. Well, initially we were walking abreast and then as we got up towards the edge of the building I stepped ahead.

Q. Now what, if anything, happened from that point forward? A. Well, as I recall, I took one or two steps and fell, and then the next thing I knew I had fallen into a hole.

THE COURT: I didn't hear. Fallen into what? Somebody coughed at that very moment.

(The reporter read the last answer.)

THE COURT: A hole?

BY MR. LASKEY:

Q. Now, this was several hours or at least two hours after you had left the car there to go to the game; is that correct? A. Yes.

12 Q. And you know about what time it was? A. I don't know exactly. I would say about 10:30.

Q. Tell us what the condition was in the area just before you fell with regard to lights. A. It was dark. The light was -- most of the light in the area, as I recall, was centered on the gas station, where the gas pumps and the general working area of the station.

Q. You had passed that area at the time of your accident? A. Yes.

* * * * *

Q. How far had you gone, if any distance, beyond the lighted area at the time you fell? A. Just a few feet. I couldn't say exactly.

13 Q. What was the condition of lighting at the place just before where you fell? A. It was dark.

Q. Did you at any time see what caused you to fall? A. No.

Q. Describe, if you will, to the best of your recollection, your sensation, including your falling, your walking and your falling. A. Well,

I took a step and then realized -- the next thing, I realized that I was down in a hole or at the bottom of something.

Q. Can you state whether or not your foot came in contact with any obstruction which caused you to fall? A. No, I don't recall that it did.

Q. What was your feeling when you found yourself in this hole? A. Shock, first. Then I realized I couldn't -- My leg felt very strange; numb. Numbness started.

Q. Which leg was that? A. The right leg. And --

Q. Could you see in this hole? A. No.

* * * * *

14 Q. Then what happened? A. Then Mr. Lawrence and some other gentleman helped me out of this hole.

Q. Did they take you anywhere at that point? A. They got me up and I sat on some steps, as I remember, nearby, and waited for Mr. Lawrence to get the car.

* * * * *

16 BY MR. LASKEY:

Q. Mrs. Daly, what happened after you were seated there, after you were lifted out of the hole? A. After I was seated?

Q. Yes. A. Mr. Lawrence brought the car around, and the other gentleman and Mr. Lawrence helped me into the car. We drove off, looking for a hospital.

17 * * * * *

Q. And then where did you go? A. We drove to Garfield Hospital, thinking it was open, but it had been closed the week before.

Q. Where did you go from there?

* * * * *

18 A. To George Washington University Hospital.

* * * * *

Q. And a doctor was called? A. A doctor was called.

Q. Do you recall the name of that doctor? A. Yes. Dr. Leonard Peterson.

* * * * *

19 Q. Now, did Doctor Peterson have you admitted to the hospital as distinguished from the emergency room area? A. Yes, he did.

* * * * *

22 Q. Assuming that the hospital records reflect that you were admitted on the morning of June 13 and discharged on June 19, would that be in conformity with your recollection? A. Yes.

Q. Now, were you in a cast at the time you left the hospital?

A. Yes, I was.

Q. Describe that cast, please. A. It was the same cast that was first applied; a cast going from just above the toes to the hip.

* * * * *

23 Q. How long did you remain in that full hip to toe cast? A. About six weeks.

* * * * *

Q. When the cast was removed, it was removed where? A. In Doctor Peterson's office.

Q. What was put in place of the cast which was removed?

A. A shorter cast was put on. A walking cast, I believe.

Q. The shorter cast stayed on for how long? A. About the same 24 length of time. Six weeks, maybe a few days short of that.

* * * * *

Q. Did you receive treatment following the removal of the cast?

25 A. Yes, I did.

Q. Can you tell us what kind of treatment you received?

A. Physical therapy, heat -- diathermy, I think it was called -- and massage.

Q. Do you recall how frequently that was, approximately, with Doctor Peterson? A. I believe twice a week.

* * * * *

Q. How long did you continue with Doctor Peterson after that?

A. I continued with Doctor Peterson -- including the therapy, you mean?

Q. Yes. A. Until about the first of December, I think.

Q. Of 1958? A. Yes.

* * * *

27 Q. Do you still have any difficulty, and if so, describe it. A. Yes. My ankle still swells when I walk a great deal. It swells and I have discomfort in certain kinds of weather, damp weather particularly. Motion is limited, in that I don't move around as quickly or as easily as I did. For instance, in playing tennis or --

* * * *

28 MR. LASKEY: Bill addressed to Miss Virginia Warren, Hotel Sheraton Park, Washington, D. C. Statement of hospital services rendered under date of November 26, '62, the bill is dated. Statement of hospital services rendered from 6-13-58 to 6-19-58, rooms, meals and 29 nursing, six days at \$27.50, \$165; operating room, \$22.00; pharmacy, \$7.65; medical and surgical supplies, \$11.90; post anesthesia room, \$3.00; X-ray, \$30.00; anesthetic, \$30.00; laboratory, \$9.00; telephone, \$2.94; emergency, \$3.00. Total, \$284.49 less payments on account, \$284.49. Balance, zero.

* * * *

30 CROSS EXAMINATION

BY MR. RYAN:

Q. Mrs. Daly, getting down to the evening in question, I understood that you drove from Ted Lewis' Restaurant to the ball park with Mr. Lawrence. Was anyone else present with you at the dinner at Ted Lewis' ? A. No.

Q. And no one else was present with you in the car coming from Ted Lewis' to the ball park? A. No.

Q. You recall what street or streets you covered in the immediate vicinity of the ball park as you came to the Sinclair gas station that you identified? A. No, I don't. I don't know that area very well.

Q. You remember which direction the car was turned from coming from the public street to head into the alley? Did you turn to your right or did you turn to your left? A. I can't say exactly. I have a

vague recollection of turning to the right but I couldn't say exactly.

Q. But that is indefinite? A. That is indefinite.

31 Q. You have no definite recollection as to how you got into the alley? A. That is right.

Q. Once in the alley, let me ask you this: Your car was then headed downward or away from the streets you had been on, you were headed down the alley, the car was moving forward, you weren't backing into the alley? A. No.

Q. Were there other cars parked in the alley? A. I can't say there were cars parked in the alley. There were cars driving into the same area and a lot of milling around of pedestrians and people.

Q. This is as you were going in, at the outset? Before? A. Before we had gone to the game, yes.

Q. There were, generally speaking, many cars and many pedestrians milling around in this general area? A. Yes.

Q. How far into the alley had your car gotten when you alighted from it? A. I can't say exactly. I would -- as I recall, maybe a car or two cars, the length of the car, into the alley. I can't be sure of that at all.

Q. Had you gotten as far into the alley as to be opposite the place where you later had your accident after the game? A. No.

32 Q. As you came into the alley at the outset, were the car lights on? A. I don't believe so. I don't believe it was dark.

Q. Still daylight at that point? A. I think it was dusk. I don't recall whether the lights were on or not. I know it was about dusk. It was summer time.

Q. Then when you alighted from the car, where did you go to stand to wait for Mr. Lawrence? A. As I recall, I stood just about where I got out of the car and waited for him.

Q. In the meantime, other cars were coming into the alley behind him, were they? A. I couldn't say specifically that other cars were coming, that other cars came in directly behind us.

Q. Do you recall what, if anything, was transpiring to vehicles that were ahead of him going in the same general direction, these milling cars that you said? A. I don't recall anything specifically.

Q. Did you keep the Lawrence car in view as it left the place
33 where you got out of it until it reached a place where it was parked? A. No.

Q. You don't know how far down the alley he went? A. I don't know how far down, no. I don't know that Mr. Lawrence parked the car. I am not sure. I don't know whether any attendant took it or Mr. Lawrence. That is not clear in my mind.

Q. Up until the time you got out no attendant had taken it; is that correct? A. Up until the time I got out? No.

Q. And you saw no attendant take it after that? A. No. I saw no attendant.

Q. And you don't know, as you now tell us, number one, how far down the alley Mr. Lawrence drove the car? A. No, I didn't see. I didn't see at all where the car was parked.

Q. Nor do you know of your own knowledge whether an attendant or Mr. Lawrence parked the car? A. I couldn't say for sure.

Q. Now, how long did it take you to stand there and wait from the place where you alighted until Mr. Lawrence came back to meet you again, to cross from there to the ball park? A. As I recall, I stood
34 just a very, very short time.

Q. Could you fix that? A. I can't fix that in minutes or seconds.

Q. And I believe you have told us that the game was over at about 10:30? A. Yes, I believe so.

Q. In that area? A. I believe so.

Q. You came back then toward the car by leaving the ball park, crossing Georgia Avenue, and then -- A. Yes.

Q. And then where did you next go? Through the station? A. I don't recall exactly, whether we cut across the station or walked down to an opening. I can't say for sure.

Q. Let me ask you this: Were there cars parked in the station proper when you first arrived there to park before you went to the ball game? A. As I recall, there were, yes.

Q. Now, then, my next question is: Were cars still parked there on the station property when you came from the ball park to go back toward your car? A. Yes, as I recall, there were.

Q. But you don't remember whether you came walking through 35 the gas station or whether you remained walking on the sidewalk? A. No, I don't recall exactly.

Q. Mrs. Daly, can you tell us approximately -- maybe you can use something in this room if you can't tell us in feet, or if it is more than this room, maybe you can tell us one and a half times -- can you tell us how far from Georgia Avenue it was until where you came to this alley that you were going to go into? Tell us that in either feet -- A. From Georgia Avenue to the alley?

Q. Yes. A. I haven't seen that property for some three and a half or four years. More than four years.

Q. Was it as much as a half a city block long? A. It might be the length of this room. But I couldn't say definitely.

Q. As you passed by it that night, and not knowing whether you came through it or around it, was it still lighted? A. Yes. There were lights on the station proper?

Q. Yes. A. Yes. I recall some lights in the station proper.

Q. And do you recall whether or not those were floodlights?

36 A. I don't recall.

Q. You recall seeing whether or not gas pumps which were located on the gas station had what I might call island lights on both the pumps?

A. I don't recall where the lights were.

Q. Now, there did come a time at least when you got to this alley, whether you got to it by coming through the station or down the sidewalk. What is your first recollection as you started down the alley? A. We walked in a normal fashion down the alley until we came to, as I recall,

the edge of the building where there was a car parked, and at that time we stepped to the left to go down a passage between the car and the building. I stepped ahead of Mr. Lawrence and then the accident occurred.

Q. All right. Now, then, the first car that you came abreast of, or anywhere near that obliged you to change your course of travel, was a car which you identify as being parked near the edge of the building, gasoline station property? A. It was parked parallel to the building, yes.

Q. Headed in which direction? A. I can't say which direction it was headed.

Q. Were there other cars parked in that alley at that time? 37 A. I couldn't say that. I couldn't tell you. I don't know. I don't recall. There were cars, oncoming cars; there were cars coming down the alley towards us, and people, many people walking.

Q. Now, there were cars going the same way you were going as well as cars coming out of the alley? A. No; not that I recall. I just remember the cars coming towards us.

Q. Those cars coming toward you had their headlights on? A. Yes; as I remember, they did.

Q. In addition to their headlights, were there also city lights in the alley? A. I don't recall any city lights.

Q. Do you recall any lights on the side of the building, on the walls of the building? A. No, I do not.

Q. In connection with the cars which were coming toward you, Mrs. Daly, you were at that time still walking abreast, I believe you have told us, with Mr. Lawrence. Were you on his right or he on your right? A. I don't remember. I imagine -- I think probably he was on my right.

Q. But you don't know for sure? A. I don't know for sure. 38 Q. Can you recall how close the cars coming toward you were passing beside you? A. No.

Q. You have not the slightest idea as to how close they were passing beside you? A. The width of persons?

Q. Let me ask you this: Were there cars parked in the station proper when you first arrived there to park before you went to the ball game? A. As I recall, there were, yes.

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Q. Yes. A. I haven't seen that property for some three and a half or four years. More than four years.

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Q. As you passed by it that night, and not knowing whether you came through it or around it, was it still lighted? A. Yes. There were lights on the station proper?

Q. Yes. A. Yes. I recall some lights in the station proper.

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Q. But you don't know for sure? A. I don't know for sure.

38 Q. Can you recall how close the cars coming toward you were passing beside you? A. No.

Q. You have not the slightest idea as to how close they were passing beside you? A. The width of persons?

Q. Any other width that you can describe it. Feet, persons, or widths. A. I can't say exactly, no. They weren't brushing up against us. It wasn't that crowded.

Q. Was this a steady stream coming toward you from out of the alley, of cars? A. I couldn't say that either.. I just recall seeing cars and people walking down the alley towards the cars that were coming out.

Q. And were these people walking down the alley toward the cars that were coming out ahead of you? A. Yes, I am sure there were some.

Q. How far ahead of you were they, Mrs. Daly? A. I couldn't say. There were a great many people leaving the ball park and we were all walking in the same general direction.

39 Q. So then there were a great many people ahead of you going down the alley? Are you telling us that also? A. I don't recall anyone directly in front of me. I know there were a great many people in the service station and in the alley.

Q. Without recalling any specific person ahead of you, do you remember seeing people ahead of you in the alley, going the same direction you were going? A. Yes.

Q. And they were walking also? A. Yes.

Q. In the alley? A. Yes.

Q. Now, did you and they walk in the same? A. I beg your pardon?

Q. Did both those persons who were ahead of you and you and Mr. Lawrence walk in the same part or section of the alley, the same segment of the alley? A. Through part of it, yes.

Q. What caused you to change from that part in which you and these other persons were walking, to change your course to walk single file, as I think you have told us? A. A car that was parked parallel to the building. With the oncoming traffic and the congestion, we would either go to the right or to the left of this car. We went to the left of

40 the car, down a passage between the building and the car, the parked car.

Q. Did you see any of the other of these persons who were ahead of you choose a left-hand path? A. I wasn't paying any attention to that. I didn't see them.

Q. Incidentally, at this time and at this point, Mrs. Daly, you didn't even know where you were going, did you? You didn't know where the car was parked? A. I didn't know where the car was parked, no.

Q. So Mr. Lawrence knew where it was parked, I presume?

A. I presume he did.

Q. But you were leading the way, he was following you? A. I wasn't leading him to the car. He stepped behind me to allow me to go ahead through this opening.

Q. How far ahead of you -- let me back up a little bit. You saw a car parked somewhere in the alley ahead of you. How far were you from that car when you observed that there was a car parked ahead of you in the alley? A. Oh, just a few feet. I can't say.

Q. You mean you couldn't see a car parked in the alley until you were within a few feet of it? A. I wasn't looking for a car to be parked in the alley. We were just walking along in a normal fashion. I was, 41 actually, just going with Mr. Lawrence in the direction that he, I guess, knew the car to be parked.

Q. You weren't, then, observing what conditions of either traffic or the alleyway, or the terrain was and so forth, you were relying on Mr. Lawrence to guide you to wherever you were going? A. I was walking, as I normally do, to my parking lot, where I or anyone else I was with would park a car. I wasn't paying specific attention to any one particular thing.

Q. And you paid no specific attention nor did you see this car which caused you to change your direction of travel until you were within a very few feet of it? A. I don't remember when I first saw the car.

Q. All right. Now, in any event, after you did see it you then changed your direction and walked to the left? A. Yes.

Q. Of the path where you had been following, and at that point Mr. Lawrence fell in behind you? A. Yes.

Q. Now, how far ahead of you, Mrs. Daly, could you see then?

A. How far ahead of me could I see then?

42 Q. Yes, ma'am. A. Well, the accident happened rather suddenly after I stepped ahead, so I couldn't say. The next thing I knew I was in darkness, at the bottom.

Q. Are you telling us that you took a number of steps in darkness without being able to see at all where you were going? A. I took one or two steps. The area we had left had more light on it than of course the area between the building and the car, where I stepped ahead of Mr. Lawrence. I took a couple of steps and then was down in the stairwell.

Q. What, if anything, did you see ahead of you while you were taking those one or two steps? A. I don't recall seeing anything ahead of me.

Q. Were you looking? A. I was looking as I normally look walking down the street, yes.

Q. Is that with your head up and your eyes straight ahead, or if that at the roadway or pavement upon which you are walking? A. Well, it depends. I couldn't say where exactly I looked at that particular moment.

Q. It isn't a fact, is it, Mrs. Daly, that at this particular moment you had started to pass this car on the left and you were turning around 43 to look over your shoulder to see if Mr. Lawrence was closely behind you, following you, and if you were going in the right direction toward his car? A. No, I don't recall that at all.

Q. And how close behind you was Mr. Lawrence at this time? A. I believe he was right behind me.

Q. He didn't catapult over you and fall into the same stairwell or stairway that you did? A. No.

Q. He was far enough behind you so that he didn't fall? A. He must have been enough behind me so that he didn't fall in, yes.

Q. Mrs. Daly, did you then wear glasses? A. I beg your pardon?

Q. Did you then wear glasses? A. Yes.

Q. Did you have your glasses on at the time this happened?

A. No, I don't wear glasses and didn't wear glasses except for very far distance.

Q. For a very far distance? A. For distance, yes. For great distance.

Q. But you didn't have glasses on nor saw no need to have them on as you walked down this alley? A. No.

Q. While you were passing to the left of the parked car in the alley, did the car which was coming up the alley and which caused you to change your path to get over that way, did it come on past? A. As I was going to the left between the car and the building?

Q. Yes, ma'am. A. I don't recall that.

Q. Do you recall other cars still coming up the alley towards you as you were passing to the left, other than the one that first caused you to get over there? You recall any other cars -- A. No.

* * * * *

Q. You recall that all of those cars, or maybe not all of them -- do you recall if the cars coming up the alley in the opposite direction from you, all had their headlights on? A. I don't recall that all of them did. I know that some of them did, yes.

45 Q. Could you see down the alley any distance beyond where the parked car was and this hole that you stepped into? By that I mean, was this just one isolated dark place beyond which was another area that was lighted? A. I don't recall that.

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46

ROBERT V. SMITH,

called as a witness by the plaintiff, being duly sworn, was examined and testified as follows:

* * * * *

47

DIRECT EXAMINATION

BY MR. LASKEY:

Q. Will you state your name, please. A. Robert V, as in Victor, Smith, S-m-i-t-h.

Q. And your occupation, Mr. Smith? A. I am an attorney.

Q. A member of the bar of this court? A. Yes, sir.

Q. Did you have occasion, Mr. Smith, to attend a ball game during the month of June following which you witnessed an accident? A. Yes, sir; that was several years ago.

48 Q. In 1958? A. As I recall, yes, sir.

Q. Are you familiar with the area, particularly the Sinclair service station and the alley next to it, near Georgia Avenue, and Griffith Stadium, where this accident occurred? A. Yes, sir.

Q. Would you step to the blackboard and draw for us a diagram, not to scale, showing the area about which you are about to testify?

A. That is at Georgia Avenue and V Street?

* * * * *

53 Q. Mr. Smith, on the occasion of June 12, 1958, did you go to a ball game at Griffith Stadium? A. I was at a ball game in June of 1958 when this accident occurred, I witnessed. I don't know what the date was.

Q. Who were you with on that evening? A. I was with my associate in my law office by the name of Virginia Lee Riley.

Q. How did you get to the ball park? A. We took a cab to the ball park from the office, which was downtown on Fifteenth Street.

Q. And after the game was over where did you go? A. Well, 54 we went to the gas station there to retrieve my car which I had parked there. I am wrong. I didn't take a cab. I am sorry. I went to the garage and got my car and drove to the game. I am sorry. Many times I have taken a cab and I forgot.

* * * * *

Q. Now, tell us the route you and Miss Riley took, briefly, in coming from the ball park and going towards your car, what you observed and what you saw happen on the way. A. Well, we came out of the ball park entrance, which is a main entrance, down towards Georgia Avenue, crossed in the middle of Georgia Avenue, about opposite the

Mission Church which is there, walked north on Georgia Avenue to the corner of Georgia Avenue and V Street, and walked down V Street to the edge of the alleyway, as indicated on the drawing.

56 Q. Were other people in the area ahead and behind you? A. Yes, sir; there were other people walking ahead and behind.

Q. What was the situation with regard to vehicular traffic in the alley and at V Street? A. Well, as we reached the edge of the alleyway as I recall, there were one or two cars coming out single file from the alleyway facing V Street. That is the situation as far as vehicular traffic was concerned.

Q. Now, at the point of the alley you turned and went south, is that correct, with Miss Riley? A. We turned left and went south, that is right.

Q. And were there people ahead of you? A. I noticed two people ahead of me; a man and a woman, yes, sir.

Q. Tell us what you observed with respect to that man and that woman from that point forward. A. Well, as we started into the alleyway, as I said, there were one or two cars coming out single file, so instead of going into the alleyway proper, we went to the left between a line of parked cars which were facing V Street north. They were parallel to the parking lot or the corner garage there, gas station. And there was a space about a foot to two feet behind cars which were parked

57 in the gas station proper facing Georgia Avenue. So that there was a little pathway between parked cars facing V Street, north on V Street, and the back end of cars which were parked in the gas station facing east toward Georgia Avenue, which were bumper to bumper and solid. And likewise the cars that were lined facing V Street were bumper to bumper as well. So Miss Riley and I had followed -- there were two people in front of us, which we discerned were a gentleman and a lady -- down that little path which went parallel with those cars and back towards the back end of the alley.

Q. What happened? A. Well, as we got towards -- The lady

Q. And your occupation, Mr. Smith? A. I am an attorney.

Q. A member of the bar of this court? A. Yes, sir.

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Q. What happened? A. Well, as we got towards -- The lady

was first and then the man and I was next and Miss Riley was following behind me, fairly closely behind one another. I imagine she was five or six feet in front of me. All of a sudden I saw her head disappear, and the next thing I knew I was up on this areaway.

Q. Could you see the areaway? A. No, sir, not actually, I couldn't see it.

Q. What could you see? A. Well, you could see out through the alley up high, towards U Street there, because that area is light. It's quite a ways down the end of the alley before you get to U Street.

58 You could see in general up high. But down low you couldn't see too well. It was pretty dark there.

* * * * *

Q. You have no knowledge, do you, of the technical property line or dividing the property of the Sinclair station or where the Sinclair station was and the public alley? A. No, sir, I do not.

* * * * *

59 Q. Do you know where the technical dividing line is between the public alley and the private property? A. No, sir, I do not.

Q. To complete your diagram, and from your recollection being refreshed by these photographs, place on your diagram where this areaway into which this lady disappeared is.

THE COURT: Step down, Mr. Smith.

(The witness stepped to the board.)

A. My recollection is that the areaway is a few feet past where the 60 building -- where this brick building is. In that area there, right here somewhere. Whether it is in the alley or on the property, I don't know. But that is generally where the areaway is. I recall there are some steps up beyond that that go into the building.

* * * * *

61

BY MR. LASKEY:

Q. My question was: What was the condition with regard to light in this area, that is, the area surrounding the gas pumps? A. There were lights. My recollection, there were the lights only on the pumps.

Q. Do you remember whether or not there were lights in the building itself? A. My recollection is there was some light in the building, yes, sir.

Q. That is the service station? A. Yes, sir.

Q. With regard to the area where you have drawn the steps down, where you saw the woman fall, can you tell us what was the condition of lighting there? A. Well, there was no lighting at all, Mr. Laskey, back in this area. None whatsoever. It was completely dark.

Q. Can you state whether or not there was any protection around the opening where you saw the person later identified to you as Miss Warren? A. By protection, I don't know what you mean.

Q. Anything that would prevent someone from going into it? A. 62 There was no railing. The only thing that I recall, there was about two inches of an edging of either brick or cement. It looks like brick in the picture. I didn't see what it was at that night. But there was a little, about two inches of brick or cement above the areaway from the side.

Q. Will you resume the stand now.

(The witness resumed the witness stand.)

MR. LASKEY: Your witness, gentlemen.

CROSS EXAMINATION

BY MR. RYAN.

Q. Mr. Smith, how many cars were parked in this alley from V Street down to where you later saw Mrs. Daly fall?

THE COURT: You mean after the game or before the game?

MR. RYAN: Yes, sir; after the game.

A. Well, Mr. Ryan, they were solid from the sidewalk back to at least the corner of that building. Now, how many cars would fit in there. There probably -- I didn't count them, to be frank with you.

I would judge there would be five, five or six.

Q. Solid? A. Solid. Bumper to bumper, yes, sir.

* * * * *

64 Q. As you went into the alley what, if anything, was on the west side of the alley? A. Well, my recollection is there were a few cars parked over here like this, and some cars in this garage, which was open - the doors were opened, mostly. They were opened that evening, anyhow, when I went in and when I came out. There is a double garage here. There were some cars in there. How they were parked, I don't recall. There were some cars in here like that. I didn't notice that those were solid. But there were some cars over there.

Q. So then the picture we now have, Mr. Smith, is a line of cars parked on what would have been the east side, whether it is the alley or part of the Sinclair station or not we don't know, but on the west side also, and was that then a line left open down the middle of the alley for traffic? A. Yes, sir. Wide enough for a single line of traffic to come out. As I said, there were one or two cars coming out as we approached this place here.

Q. I see. A. So instead of going down here we turned left and went down there.

THE COURT: Use a dotted line to show where you went, will you?

THE WITNESS: Yes, sir.

(The witness drew a dotted line.)

BY MR. RYAN:

Q. Now, as you proceeded along that dotted line, when did you first become aware that there were two persons ahead of you who you now know to have been Mrs. Daly and Mr. Lawrence? A. Well, they 66 turned left into that line, as I recall it, just ahead of us. We were coming down. I, of course, didn't know anyone was. My recollection is they turned into that space there the same time, just ahead of us.

Q. And in turning into that space just ahead of you, did they turn

in immediately and start single file? A. Yes, sir.

* * * * *

67 Q. Did you at any time, while you had under observation ahead of you Mrs. Daly and Mr. Lawrence, observe Mrs. Daly change the direction of her travel and turn more to the left than she had been going before? A. No. My recollection was it was pretty much of a straight shot to the back of that areaway.

Q. She didn't have to change the direction from the time she made her left turn from V Street until she walked straight ahead and into the cave? A. That is my recollection.

Q. Specifically you don't recall whether she at any time started down the alleyway and came to a point where there was a car ahead of her, that she went to the left to go behind and stepped into a -- A. I don't recollect that, Mr. Ryan. My best recollection is we were walking straight ahead and all of a sudden her head disappeared and

68 that was it.

Q. I think you told us, and is that a fact when the head you saw disappear was some five or six feet ahead of you? A. No more than that. We were right behind one another single file.

Q. But you could see the head? You could see two people ahead of you? A. I could see two people ahead of me because of the light that you see down the alley; you can see their head and shoulders, yes, sir.

Q. Could you see anything beyond that down the alley? A. Nothing immediately in front; at eyes level or above shoulder level.

Q. Could you see out into the alley proper at that point? A. Well, I couldn't see out of the alley because of the fact that there were parked cars on my right. And as cars moved along the alleyway their light would reflect between the cars and that would be the extent of any seeing that I could do.

Q. Incidentally, Mr. Smith, were all these cars which were parked on either side of the alley headed in the same direction, or were

some headed north and some headed south? A. My recollection is that the cars that were parked facing on both sides, from the alley-way, facing north, were facing north. That is my recollection. Except for perhaps the cars in the garage, which I don't remember how they were, to be frank with you.

* * * * *

Q. Did you know where your car was going to be after the game when you started down that alley? A. I didn't know exactly. I knew it would be back in the back part somewhere. I have parked there many times and generally speaking it is back in one of those -- either along the alleyway or against one of -- somebody's back yard back there, or lot, whatever you want to call it.

70 Q. Somebody's back yard. Isn't that where many of the cars were parked, in people's back yards back there? A. Yes, they have been.

* * * * *

72 Q. You have indicated, I believe, Mr. Smith, that you observed lights at or around the gas pumps. Did you observe any other flood-lights of any nature on the building, its V Street side? A. No, sir, I did not.

Q. Were there any street lights in that same immediate neighborhood? A. There are some lights on V Street. I mean on the corner of the alley and V Street it is fairly light. But as you go on back towards the back there it gets rather dark.

* * * * *

73 Q. To your knowledge are there any alley lights provided by the city government in that alley? A. I don't recall any alley lights. At least, down to the area where your cars are parked in the back.

* * * * *

Q. Did you observe whether or not Mrs. Daly and Mr. Lawrence were walking slower than usual? A. I know I was, and we were right behind them. I was right behind them and we were sort of picking our way along the areaway.

Q. What specific conditions necessitated your walking slower, to pick your way along, Mr. Smith? A. Well, it got progressively darker as you went to the back. And you wouldn't run, for one thing. I mean, I didn't run. We didn't walk in a normal fashion. We walked a little slower than would be normal, I would say.

74 Q. How far beyond the corner of that building is it where this stairwell is? A. It's just a few feet, as I recall.

Q. And is it at the corner of the building that the condition got dark, and necessitated you to slow down? A. Well, I would say it was before that.

* * * * *

BY MR. ARNESS:

* * * * *

75 Q. You mentioned, Mr. Smith, you got out of the ball park this evening quickly and ahead of the crowd so that the cars were still there on the filling station premises. Was there an advantage to you to get out of the ball park ahead of the crowd? A. Well, ordinarily there is. If you get your car first, you can get ahead of the other people. You don't have to move. That is, if you are lucky enough to have your car in a place where it can be moved. A lot of times we get out early we are blocked out.

Q. You run into some monumental traffic jams in that area? A. That is correct.

* * * * *

76 A. My recollection is that there was a car that was parked practically right up against the edge of the stairwell. Not across the stairwell, because the only way I know that is because that is how I got down, I mean out of the stairwell, but.

Q. It is your recollection, is it not, that cars were parked roughly from the sidewalk to the edge of this building, a little bit beyond but not quite up to the stairwell; isn't that correct? A. It wasn't across the stairwell. It was up to the edge of the stairwell. I don't know how

far that was. Whether it was six inches, eight inches, a foot, I don't know.

* * * * *

77 A. There is about a foot there, I would say.

Q. A foot here. All right. About a foot, not much farther? A. Well, my recollection is that there was a car parked practically up to the edge of the stairwell. There was no car blocking the stairwell.

Q. Thank you, sir.

The last car in line, or the one that would be closest to the stairwell, was it in a, relatively speaking now, straight line with the other cars that were parked there? A. My recollection is that that whole line of cars parked in the alleyway, facing north, towards V Street, were in a relatively straight line, yes, sir.

Q. When you turned into this area you walked down there. Just prior to that had you been walking side by side with Miss Riley?

A. Yes. She was side by side. We were.

Q. When you turned in there, you then went single file? A. Yes, sir.

Q. Which one of you went first? A. I went first.

* * * * *

79 Q. And then after you came back from the game it was down there, so you never at any time saw your car on the Muldrow filling station premises that night, did you? A. Oh, no.

Q. And you at no time that night went on the filling station premises themselves either, did you? A. No.

Q. And Miss Warren didn't go on the filling station premises to your knowledge either? A. Not to my knowledge.

Q. When you saw her she didn't? A. That is right.

* * * * *

81 Q. What is your recollection with respect to when you came out

82 of the ball park? Were you in the first group to come out or were there a lot of people who came out ahead of you? A. I would say we were pretty much in the first group to get out. Our seats were right

behind -- right at the edge of the Senators dugout there and fairly close to the entranceway.

* * * * *

Q. As you came into the alleyway, you have already told us that there were two cars in the act of emerging? A. I said one or two.

* * * * *

87

BY MR. WELCH:

Q. How far back from the alley line, according to your best recollection, is it to the point where the front of the building ends, or the front line of the building stops?

MR. LASKEY: Might I ask Mr. Welch to define what he means by the "alley line," if the Court please?

88 THE COURT: Yes. This witness has said he doesn't know where the alley line is. So I think you better define it.

MR. WELCH: All right. I will try to do that.

THE COURT: From this corrugated iron covering.

MR. WELCH: If the Court please, I submit if we are going to use this for anything, we have to use it for landmarks.

THE COURT: Very well.

BY MR. WELCH:

Q. What did you draw this line for, from north to south, Mr. Smith?

A. I drew that line merely as my impression of a division between what appears to be an alley in the back, and a line which would indicate the filling station proper.

Q. To put it in very simple language: You drew it as the alley line, didn't you? A. I couldn't draw it as an accurate alley line because I don't know exactly where the alley begins and ends. I merely drew that as an impression: to divide for my purposes, of explaining my impression of where the line would be from observers.

* * * * *

91 Q. * * * Now, then, when you turned to your left to go south, were you walking in the alley? Were you walking west of or east of that east alley line? A. Well, I couldn't tell you exactly whether I was

walking inside that line that I drew or -- all I know is that I was walk-
92 ing between --

Q. Mr. Smith --

THE COURT: Let him finish.

A. (Continuing) All I know --

MR. WELCH: If the Court please, he has answered my question.

THE COURT: I disagree with you.

A. (Continuing) All I know is I was walking between a line of parked cars facing north on V Street and the back end of cars which were parked facing Georgia Avenue. Now specifically whether I was walking on the parking -- on the gasoline side lot, or on the alleyway proper, I just can't tell you.

BY MR. WELCH:

Q. Well, after you reached the point that you have physically described as being the east alley line or the edge of the alley, after you reached that point, and made your left turn, did you continue to walk west of that line or did you cross back over east of it as you came south? A. Well, my recollection is, Mr. Welch, I merely turned left and walked where I have told you I walked. Now, whether I was over one line or the other I can't tell you.

Q. Then is it simply a statement that you don't know whether you
93 were walking on the gas station property or the public alley? A. That is exactly what I have been trying to say.

Q. Do you know whether the people ahead of you were walking on the gas station property or the public alley? A. I couldn't say. They were directly in front of me and my recollection is we walked in a straight line.

* * * * *

94 Q. Can you tell from that picture where the alley ends and where the gas station property begins? A. Well, only by assumption.

Q. I am only asking if you can tell from looking at it where in your opinion does the alley end and the private property begin as shown on this picture.

95 MR. LASKEY: I think that has been answered and I will object on that basis.

THE COURT: Overruled. He only wants to know where, in your opinion, one begins.

A. In my opinion, since I would assume that stairwell and steps should not protrude into the alley, that the alley would begin where this iron grating is.

BY MR. WELCH:

Q. That is the iron grating that Mr. Ryan asked you about a little while ago, isn't it? A. That is right. As I said, I didn't recall at the time which side I walked on.

* * * *

108 Q. As a matter of fact do you recall or did you notice whether there were lights lighted on the front of that shed or garage or lubricating building when you came along V Street and turned left at the edge of the alley that night? A. I believe I testified on direct testimony I did not recollect seeing any lights over there that particular evening.

Q. I am not asking you whether you recollect seeing them or not. The purpose of your testimony before the jury and the Court in this case, is it your testimony that there were or were not lights lighted 109 there, or do you know? A. I said I did not know.

Q. You don't know. Were there or were there not lights lighted on the front wall of the building at the gasoline station as well as lights on the gasoline pumps? A. My recollection was to the effect that there were no lights on the front of the building. There were lights, however, on the gasoline pump and there were lights coming from inside the little office* there in the building.

Q. How many lights were at the gas pumps? A. I can't tell you.

Q. You don't have any idea whether there were two or four or six? A. No, sir, I couldn't recall.

Q. And you don't remember now actually whether there were or were not floodlights on the front of that building? A. My recollection

is that there were not floodlights on the building.

Q. Did the lights from the gasoline station sufficiently light your paths so that you could see where you were going as you walked from V Street toward the point where this accident happened? A. As you went back towards the back where we were walking, it got progressive-

110 ly darker.

Q. Farther back you went, the darker it got? A. Yes, sir.

Q. And these other persons that you mentioned, the man and woman, were just a few feet or a few steps ahead of you? A. That is correct.

Q. And you were walking virtually in single file, four persons, is that right? A. That is correct.

Q. At what point did it get so dark that you couldn't see ahead of you here? A. Well, actually as you go along in the dark you can adjust your eyes in a way to the darkness. There wasn't any point where you couldn't absolutely see completely, that I know of. I mean, you could see something. But it was very, very dark there. As a matter of fact it was dark enough just to see the shadow of the person ahead of me, who was a man, and the person ahead of him whom I could discern was a lady.

Q. Is it your testimony, Mr. Smith, that the light that lighted up the area of the gas station itself did not show any beyond the edge of the building toward this little areaway? A. My recollection of the 111 lighting of the gas station itself was fairly dim. There was no great lights around the area. It isn't lit up like some modern stations are, with fluorescent lights. It was not what you would call well lit. The light was fairly dim, I would say.

Q. Now will you answer my question? A. What was it?

Q. My question was: Is it your contention that none of the light from the gas station area came back here toward this area of the stairway? A. I would say it would not.

Q. Was it your testimony on direct examination that as you reached

the edge of the building you could not see forward toward the areaway of the steps? A. I couldn't see on the other side of the areaway. I could see up in the air and the sky but I couldn't see right straight ahead of me.

Q. You couldn't see the ground ahead of you because two people were walking directly ahead of you; isn't that right? A. Well, that is part of it, yes, sir.

Q. What is the other part of it? A. Well, it was dark.

112 Q. Was it so dark that you could not see where you were walking as you just walked along picking your way? A. Well, I would say it was dark enough that you couldn't see too well to walk. That is correct.

Q. You would say it was so dark at that area that you couldn't see well enough to walk, is that it? A. Well, you had to pick your way to walk. Just like you would in the woods at night at dark, until your eyes got accustomed, you would be walking along you had to pick your way.

Q. Did I understand it then, beyond this building line that you have drawn, as you proceeded south, that it was so dark at that time that in order to proceed you had to go slowly and pick your way? A. That is right.

Q. You couldn't see what was on the ground ahead of you? A. I would say it was difficult to see. I wouldn't say you were absolutely blind, but it was difficult to see.

* * * * *

118

RE CROSS EXAMINATION

BY MR. ARNESS:

* * * * *

119 Q. It is your recollection, your testimony you have already given us, you came down to the alley and turned left; isn't that so?

120 A. That is true. Where I thought the alley was, that is right.

Q. So that would be inconsistent with having taken any short-cuts over a curbing, wouldn't it? A. That is correct.

125

THE COURT: And did the lady make any turn?

THE WITNESS: As I observed them, they turned in here ahead of myself and Miss Riley. Turned in there and went straight ahead. We walked straight ahead.

THE COURT: Made no turn at the stairway?

THE WITNESS: No, sir. My recollection is that we walked straight ahead. I don't remember making any turns at all. We were walking straight ahead in a straight line and all of a sudden her head disappeared and I was right on top of her.

141

Washington, D.C.
Tues., November 27, 1962

170

VIRGINIA WARREN DALY

resumed the stand and, having been previously duly sworn, was examined and testified further as follows:

173

[CROSS EXAMINATION]

[BY MR. ARNESS:]

Q. Now, Mrs. Daly, it has been some time that has elapsed since you testified, and you have heard of course the testimony of Mr. Smith.

When you went down this alley, though -- and not referring to what Mr. Smith said, but to your own recollection -- you don't recall any line of cars parked here that you were to the left of at all, do you?

174 A. No, I can't say that I recall that.

A. My first clear recollection is of the car parked parallel to the building, and the passageway, that I walked between, and then fell into the street.

Q. And when you approached that car you approached it in such a manner that if you had gone straight ahead you would have walked

right into the back of that car, isn't that so? A. As I recall, I stepped to the left to avoid -

Q. Yes, that is my next question. Please answer the question I have asked you now: If you had gone straight ahead and had not stepped off, you would have then walked right into the car? A. I can't say that I would have walked right into the car, but there was a car there.

Q. In any event, you were faced with the alternative when you 175 approached this car, of either going to the left around it, or going to the right around it, isn't that so? A. Yes, you could have gone to the right or left, certainly.

Q. And then you chose to go to the left around that car? A. Yes.

Q. I take it, then, that from your forward path, whatever it had been, you did take one or two steps to the left and then turned to the right again so as to go again in the direction you had been proceeding?

A. I don't recall taking two steps to the left and two steps to the right. I remember going to the left side of the car.

Q. You do remember turning somewhat to the left, don't you?

A. Yes, it is my recollection that I stepped to the left and proceeded down the path.

Q. Well, what I am interested in -- and I am not interested in how far because I wouldn't expect you to have measured it, but in establishing it that it is your recollection, from your forward path you did change your direction from the left, and then again to the right, before this accident happened? A. Yes, I guess that is right. I do remember 176 stepping to the left, so I must have.

* * * * *

Q. Now, after you resumed your forward progress, I believe it was your testimony yesterday that you took one or two steps before you felt that there was nothing under your right foot when you went down.

Is it more accurate to say that you took four or five steps from the time that you turned left to go around that car until you felt nothing

under your right foot? A. I couldn't say for sure, Mr. Arness. It was a very few steps.

Q. You did testify in your deposition it was four or five steps.

176-A A. Did I? Then that probably was more accurate than my recollection now.

* * * *

Q. * * *

"Question: All right, now, when you stepped ahead of Mr. Lawrence did you then start to walk before the accident happened, or did it happen just as you stepped ahead of him?

"Answer: No, I started to walk.

"Question: Can you tell me about how many steps you took before the accident happened?

"Answer: Oh, I would say four or five.

177 "Question: Were those steps taken beside the car that was parked?

"Answer: Yes."

Do you recall that in your testimony? A. I do now, yes.

Q. And that is true to the best of your recollection? A. Yes. I can't remember the number. It could have been two, three or four -- five steps.

Q. You said "four or five" in December of 1959, when your recollection was better than it is today? A. Yes, I think so.

* * * *

179 Q. Now, to get back to the time of the accident again, there were people as you left the ball park coming over towards the car, that were walking not directly ahead of you but that had gone ahead before you came. Isn't that so? A. Yes, I have a recollection of people being in the area.

Q. Now, when you turned this corner and started walking down to the place where the accident happened, did you see anything to the left of that car that you went to the left of to go around? A. I don't remember.

180 Q. Specifically, you don't recall seeing anybody do that, do you?

A. No; specifically, I don't.

Q. You do recall people going down the alley to the right of that car ahead of you? A. Specific people, no.

Q. Generally. I don't ask that you identify them.

Generally, you saw people go up that alley before you came to the spot? A. There were people in the alley, yes.

Q. And they went to the right of that car? A. Some people were on the right of the cars, yes.

Q. Now, I don't want you to pay any attention to the diagram because I don't want it to have any effect on your recollection, but I want you to picture the place where this stairwell was in which you stepped, and I ask you if it is not a fact that this car which you went around was parked right opposite that stairwell, or at least a portion of it? A. Covering the entrance to the stairway?

Q. Yes. A. No, I don't believe it covered the entrance to the stairway.

Q. Do you believe that any part of it covered the entrance to the 181 stairway? A. I couldn't say.

Q. Is it your recollection that that car was parked right beside the place where you fell? A. It was very near. It was very close to the stairwell, yes.

Q. Now, let me call your attention to the testimony you gave in this deposition, on pages 16 and 17, starting about a third of the way down the page.

I will read a series of questions, Mrs. Daly, and ask you does that help to refresh your recollection:

"Question: All right, did there come a time before the accident happened Mr. Lawrence left your side?

"Answer: Just before the accident happened?

"Question: Yes.

"Answer: I stepped ahead of Mr. Lawrence.

"Question: For what reason did you do that?

"Answer: There was a car parked, and traffic was starting to come down the alley, so I stepped over to the left to go ahead down the alley.

"Question: By 'traffic coming down the alley', do you mean the cars that had been parked, and were driving towards the street out of the alleyway?

182 "Answer: Yes, one way or the other, I don't remember which way. Coming, I guess, towards -- what street is that?

"Question: In other words, were you meeting on-coming traffic?

"Answer: I think so.

"Question: Prior to the meeting on-coming traffic, were you walking in the center of the alley?

"Answer: No; to the left side of the alley.

"Question: Was there any particular reason for that?

"Answer: Well, it must have been the traffic.

"Question: Do you recall that?

"Answer: Yes.

* * * * *

183 Q. Do you recall that to have been your testimony when this deposition was taken back in 1959? A. If I testified to that at that time, then that was my fairest recollection, Mr. Arness.

Q. That would be your best testimony, then, wouldn't it? A. Yes.

* * * * *

184 Q. Then, Mrs. Daly, you also told us in a series of questions I just read, that just before you made this turn to go around the car on the left side of the car, that there was traffic approaching you. You recall that? A. Yes.

Q. And that traffic, of course, being at night, had its lights on?

A. Yes, I remember headlights.

* * * * *

185 Q. And when you went beside this car and took the four or five steps

that we referred to, what is your recollection with respect to where you were looking? A. Well, I was looking as I normally would, probably ahead, in a space that had suddenly become darker.

* * * * *

186 Q. Now, what is your recollection with respect to the light that existed in the area, and on the ground between the side of this parked car and the place where the accident happened, if you have any such recollection? A. The light in that particular passageway? It was dark. That is all I can tell you, Mr. Arness; that we had come from what had been -- from an area where there had been more light, and stepped 187 into the alley where it was darker.

Q. Mrs. Daly, you are not telling me, are you, that if you had looked you could not have seen something that was in this area? A. If I had been looking on the ground, specifically?

Q. Yes. A. I don't know. It happened so quickly I couldn't tell you that. But I -- I couldn't say. It was just too dark to me.

Q. If you had been looking, you don't know whether you would have seen this stairwell or not? A. No, I don't know.

* * * * *

Q. Of course, you saw the darkened area before you fell into the hole? A. I suppose when I stepped into it I realized that it was darker, yes, and then I was down in it.

Q. You didn't realize that you were approaching a darkened area at all before you stepped into the hole? A. Well, yes, I suppose I did, but I wasn't thinking -- I was not anticipating falling into a hole or having any such problems in darkness. There it was naturally darker than the area where the lights had been coming from the ball park and the lights from the street, and the corner.

188 Q. My question to you, Mrs. Daly, is that if you appreciated that it was dark did you slow your pace or do anything at all to protect yourself from what hazard you might encounter in the darkness? A. I don't remember, Mr. Arness, whether I did or not.

Q. As far as your present recollection is concerned, you went right ahead in your normal manner as you would walking in any street or any sidewalk in daylight; is that correct? A. As I recall, I stepped ahead and took a few steps and was in the bottom of the stairwell.

* * * * *

191

CROSS EXAMINATION

BY MR. WELCH:

Q. Mrs. Daly, as I understand your responses to Mr. Arness, and your direct testimony in response to questions by Mr. Laskey, you have no recollection of this line of automobiles parked parallel with the alley facing toward "V" Street, have you? A. No.

192 Q. And if I further understand your testimony correctly, you have no recollection of a car being parked so that it partially obliterated this areaway or stairway as is shown on Mr. Smith's plat? A. Oh, I remember a car being parked there, Mr. Welch. That is the car I recall.

* * * * *

196 Q. Putting it this way: That is where you observed one parked automobile on the left side of the alley as you were walking down the alley? A. Yes.

* * * * *

Q. Now, how much space was there as you best recall, between the left side of this automobile and the building wall along where I have made the dots? A. Well, I can't say in feet, Mr. Welch. I know that it was single-file space, actually, because I did walk ahead of Mr.

197 Lawrence.

Q. Would you accept the testimony of Mr. Smith that it was about 18 inches? A. It could have been 18 inches.

Q. You would have at this time no independent recollection that would establish the distance as greater or less than 18 inches? A. No.

* * * * *

Q. If you walked along southward in the alley, I understand as you approached this car you took several steps to the left? A. I stepped --

THE COURT: One or two, I thought she said.

THE WITNESS: Yes, sir.

* * * * *

198 Q. Let me put it this way, because I was not attempting to put words in your mouth:

You moved to the left in order to pass that car, is that correct?

A. Yes, as I recollect it.

Q. In your own words, how many steps to the left do you think you took? A. I would say I took a couple of steps to the left.

Q. Now, did you make those steps to the left by actually turning or did you simply sort of side step to the left of the car? Do you remember? A. I don't remember, Mr. Welch. I remember going to the left of the car.

Q. In any event, there came a moment when you had passed beyond the left side of the car so that you could walk south past the car?

A. Yes.

Q. At that point could you see what was ahead of you on the ground?

199 A. No.

Q. You didn't have any idea whether there was a hole ahead of you on the ground or whether there was an old oil bucket or whether there was anything else there that would obstruct your passage, did you?

A. No.

Q. And is it your testimony that you couldn't see whether the way was clear? A. Yes; as we got to a certain point I couldn't see.

Q. When you had reached the point to the left of this automobile and you were prepared to walk forward past the automobile, you could not see whether your passage was or was not obstructed, could you?

A. At a certain point, no, I could not see it.

Q. I am talking about a certain point. A. Yes.

Q. The certain point is, when you were just to the left of this automobile and prepared to start walking past the car, at that certain point you could not see whether your way was or was not obstructed, could you? A. I can't say that at the end of the automobile I could not see.

Q. You can't say what, Miss? A. I can't say that at the end of that
200 automobile, as you indicated, that I couldn't see. The point of
darkness --

* * * * *

202 Q. To try to be certain about the point, the question is when you
were at the point opposite the end of this car, prepared to walk south
past the car, could you or could you not see whether your path was
unobstructed? A. Well, I believe, Mr. Welch, I could see for maybe
the distance of half the parked car, and then suddenly was plunged into
darkness between the building and the car.

Q. As I take your testimony now, you think that as you stood at this
point or reached this point ready to proceed toward the rear, you could
see about half the distance of the car? A. I could have.

Q. And for about half the distance of the car you could have seen
whether your way was obstructed or whether it was not obstructed?
A. I may have.

Q. Is that correct? A. I could have.

203 Q. That is what I said, you could have. Is that your testimony?

* * * * *

A. I could have.

Q. And is it your testimony that from that point on toward the rear
you could not have seen? A. There was a point where I could not see.
I can't --

Q. Now, you are the one I am asking to fix it -- not the jury to guess
at it.

Your testimony was that you could see, if you had looked, for about
half the distance of the car. Isn't that correct? A. No, I don't say
I definitely could see that, Mr. Welch.

Q. See what? A. But the dark -- may I tell you where the dark
place was?

Q. You couldn't definitely see what? A. I can't definitely say that
I could see, or at what point where that car was parked that I could not
see. There was a point where I could not see, where the darkness

became -- where the darkness increased, and at that point or a couple of steps beyond I fell into the hole.

204 Q. Do I understand that now you are telling us that you really don't know whether you could see, if you had looked, as much as half the distance of the car? A. I can't testify for certain to that.

Q. Can you testify for certain whether you could or couldn't see beyond half the distance of the car to the stairwell? A. Well, I can testify with reasonable certainty. If I could have seen I don't think I would have fallen into the hole.

Q. How many steps did you take after you reached the point where you couldn't see. A. I would say one or two.

Q. How many? A. I would say one or two.

Q. Will you say two or three? A. It could have been.

Q. Well, will you say at least that you walked more than one step forward where you couldn't see what was in front of you as you walked?

A. I would say I took more than one step, yes -- oh, yes.

205 Q. You realized you were in a rather close space between the side of the automobile and the back wall of the building, didn't you?

A. Yes.

Q. Were you at any time as you walked from "V" Street south, picking your way along in single file? A. I don't recall that, Mr. Welch.

Q. Well, you certainly would remember whether after you left V Street and started down the alley you walked in a normal fashion or you had to pick your way between parked automobiles?

Which was it? A. I don't recall that. My first recollection was of the parked car, stepping ahead, and the darkness and then the accident.

Q. Is it your testimony that you don't remember and you can't tell this jury today, that from the moment you turned left to walk south in the alley you didn't know whether you walked in a normal fashion alongside of Mr. Lawrence or you picked your way along between parked cars in single file? You don't remember? A. I don't recall picking my way along, no.

Q. Well, then, as a matter of fact, you don't remember much of

anything about walking down the alley from V Street do you? A. No. 206 I was not looking for anything unforeseen to happen and I was going to start the car.

Q. You were simply walking as Lawrence guided you; is that right? A. I was walking in -- there must have been some indication, Mr. Welch, as to where we were going, yes.

Q. Did it ever occur to you before this accident happened that when you reached a point where it was so dark that you couldn't see where you were walking, that you might walk into some kind of an obstruction?

A. Yes, I think I exercise reasonable care in darkness.

Q. I mean, conscious of the fact that when you reached this place where it was so dark you couldn't see where you were walking you realized that you couldn't see and you realized that there might be an obstruction; is that it?

* * * * *

207 Q. As you reached the point between that wall and that automobile where you could not see where you were walking, did or did it not occur to you that there could be a dangerous obstruction ahead? A. I don't recall, Mr. Welch.

Q. I thought a moment ago you said "Yes, it did occur to you." A. I said it could have occurred to me. It probably does whenever I walk in darkness.

Q. Well, did it occur to you or didn't it? A. I don't recall.

* * * * *

Q. Well, is it a fact that so far as your best recollection is concerned that when you reached a point where you couldn't see where you were walking, without paying any attention to your safety you kept right on walking until you fell in a hole? Is that what happened? A. Well --

Q. Is that what happened? A. Yes.

* * * * *

211 BY MR. LASKEY:

Q. Can you state whether or not, other than darkness, there was

any indication that there was a difference in the passage from the time you approached the end of the parked car forward on the left side of that car, than the area over which you had walked immediately prior thereto?

MR. WELCH: Same objection. * * *

THE COURT: Overruled.

THE WITNESS: No, sir.

* * * *

212 THE COURT: Let me ask you a few questions, Mrs. Daly:

213 Just before you fell into the steps did you stumble over anything?

THE WITNESS: No, I don't recall stumbling at all, Your Honor.

THE COURT: Did you take a step to a higher elevation?

THE WITNESS: No.

THE COURT: When you fell, did you fall to the bottom of the well or to one of the steps from the top of the well to the bottom? Do you remember?

THE WITNESS: I believe I was at the bottom of the well.

THE COURT: You fell to the bottom?

THE WITNESS: Yes.

THE COURT: Then you didn't fall on a step and slip to the bottom?

THE WITNESS: No; my first recollection was being at the bottom of the well.

THE COURT: Did you fall straight down or did you fall forward?

THE WITNESS: I believe I fell straight down.

* * * *

214

WILLIAM H. LAWRENCE

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASKEY:

Q. Mr. Lawrence, will you state your full name, please? A. William H. Lawrence.

Q. What is your occupation, Mr. Lawrence? A. I am a com-

215 mentator for the American Broadcasting Company.

Q. What was your occupation in 1958? A. I was a correspondent for the New York Times.

Q. Where do you now live? A. I live now at 1414 17th Street, Northwest.

Q. Did you have occasion during the month of June -- strike that, please.

Before I forget this, let me ask you, Mr. Lawrence, how tall are you? A. Five-eleven.

Q. Did you have occasion during the month of June, 1958, to go to dinner and a ball game with the then Miss Virginia Warren?

* * * * *

216 A. We went by automobile.

Q. Tell us, when you got within the vicinity of the Griffith Stadium, where you parked your car? A. Well, very near the stadium. We were driving east. I turned into an alley where someone was soliciting business, and drove into that alley and parked my car on a piece of unoccupied property. There were other cars there, but what I mean is it was a piece of property on which there was no structure.

Q. Did you give anyone any money? A. Yes, sir.

Q. Do you know who that was? A. No, sir.

* * * * *

Q. Do you know whether any unidentified person had any connection with the service station in that area? A. I do not.

217 Q. And from there you went to the ball game? A. Yes, sir.

Q. Will you tell us, please, what happened on your return from the ball game to your automobile? A. Well, after the ball game ended, and this was at the conclusion of the ball game because it was one of those unusual ones that Washington won, so it was the end of the ninth inning, we walked out of the ball park through what I would judge to be the main entrance as opposed to the one which we entered, which was directly across from where we parked, we were seated on the first base side, and walked up Georgia Avenue, across the street to

the north, on the south side of whatever street that is, and I do not know the name of the street, that is, after we turned left across Georgia Avenue, proceeded past the filling station to the north of the filling station, but on the same side of the street as the filling station. There we encountered traffic emerging from the alley, I presume people who had also been to the ball game other than us.

Q. Make that your only presumption, because there is a rule that you are to give facts only of your own knowledge. A. All right. We ran into traffic. We turned to our left, proceeded south hugging the left side of the alley, the alley and the filling station area --

218 THE COURT: Did you say "hugging the west side"?

THE WITNESS: If I did, I was wrong, sir. I meant hugging the east side. I beg your pardon, Your Honor.

THE COURT: All right.

THE WITNESS: Hugging the east side of the alley.

BY MR. LASKEY:

Q. That is the side to your left? A. To my left.

Q. As you have just demonstrated by your gesture? A. Yes. And suddenly Miss Warren disappeared, and I jumped in the -- she had gone down a cellar opening, some few stairs, I don't know how many. I jumped in with her and asked her if she was hurt. She said she thought maybe she had broken the heel on her shoe. I got down in there with her, and with the help of someone who came along who was obviously either just ahead of us or just behind us, I then managed to help to lift her up the stairs, where we seated her on a stoop of some kind.

* * * * *

225 Q. What if anything did you observe immediately prior to Miss Warren's fall with regard to automobiles to your right or to your left, either parked or moving? A. Well, as we -- we were hugging, as I say, this left side because there was traffic in the alley moving at a slow rate of speed. I am not at all aware of what the position was -- this would have been to your right, of course -- I am not at all --

I do not at all recollect what the situation was as to traffic on our left or parked vehicles. I have a recollection of parked vehicles there, but I have no distinct recollection.

* * * *

226 Q. * * * Was there anything which you could observe about the passageway that Miss Warren and you took which would indicate to you whether or not it was part of the Sinclair Service Station or part of the alley? A. I had no awareness of that problem at all. I paid no -- I did not address myself to it, so I have no recollection.

Q. Now, did you have any occasion while you were in the hole helping Miss Warren out, or thereafter, to observe the nature of the coping around this stairwell shown in Exhibit 2-C and also particularly as the view shown in 2-B, as well as 2-A, one giving a view from one angle and the other two from slightly different angles?

* * * *

THE WITNESS: I say, I have B and C.

227 Q. You have A now. A. Well, I don't observe anything particular in 2-A, and in 2-B and 2-C is the coping, if that is the word you used, it is disintegrated, it is crumbled. It was over that that I jumped immediately.

* * * *

229

CROSS EXAMINATION

BY MR. RYAN:

* * * * *

230 Q. And when you reached this alley that has been described by you, you made a right turn into the alley? A. Yes, sir.

Q. And on no occasion did you drive your car upon the gasoline station premises; is that correct? A. I drove down this alley.

* * * * *

232 Q. Now, in connection with the area in which you were to park, on which side of the alley was that, Mr. Lawrence? A. That was on the right-hand side, or the west side.

* * * * *

Q. What sort of an area was that in which you came to park? A. It was a piece of vacant property, in front of which I think there were some houses -- in front of which, I mean to the west.

Q. Was it paved or unpaved? A. I would only be guessing now, but I would think it was unpaved.

Q. And was there any sort of attendant's shack or office of any sort on it? A. No, sir; or if there was, I was not aware.

* * * * *

233 Q. * * * I show you photograph No. 2-B on which you placed an arrow this morning. Can you see down that alley as far as the lot upon which you parked? A. Yes, I can.

Q. Is there anything on that lot upon which you parked that we can look at the photograph now so that we can fix the location of the lot?

A. There is at least one car parked in the general area where I parked.

* * * * *

Q. It is a light-colored taxicab? A. It is a light-colored taxicab.

* * * * *

235 Q. Up to this point Mrs. Daly had occupied and ridden in the car with you, had she not? A. Yes, sir.

Q. So then after you parked the car will you tell us do you recall

which door she got out? A. She would have gotten out on the right-hand side door on the front seat.

Q. Do you recall that she did, that there was enough room between it and whatever was next to you? A. Oh, yes, there was, there was no question. She did not come out through the wheel and out the same side that I did.

236 Q. I see. And then you and Mrs. Daly walked back up that alley from where you had parked, to V Street, is that right? A. Yes, sir.

Q. And in so doing did you pass the area in which, upon your return trip, Mrs. Warren stepped and hurt herself? A. Yes.

Q. Now, do you recall upon the parking of your car and going back up the alley to V Street whether or not there was at that time any vehicles or whether there were any vehicles parked in the alley itself? A. In the alley itself?

Q. Yes, sir. A. I am unaware of any.

Q. And it was then still daylight? A. It was then still daylight.

* * * * *

237 Q. There were no cars parked in the alley as you came out of the alley? A. To my knowledge, there were not.

Q. And you passed the same identical spot in walking through the alley that later was the spot upon which she was injured, did you not?

A. We passed that spot.

* * * * *

239 Q. As you left the ball park you and Mrs. Daly were more or less the forerunners of the crowd as they were leaving, were you not?

A. As I say, this was a game that was not decided until the last of the ninth, so everybody was leaving at once instead of much earlier, as they always do. But we left immediately upon the run scoring.

* * * * *

Q. Do you recall as you passed the gasoline station light whether or not the station property itself is lighted, sir? A. I have no recollection of that at all, sir.

Q. Do you recall seeing lights on the gasoline pumps? A. I certainly think they were lighted, but it is not something that struck in my memory.

Q. Were the street lights on on V Street? A. I am certain they were.

240 Q. So actually you have no conscious recollection that brings to mind now from it -- or negatively -- that the lights were on in the gas station? A. I haven't sir. I just assume that they were on. The gasoline station was open for business and the cars were still parked there.

* * * * *

Q. When you got to the alley did those persons in the crowd of which you and Mrs. Daly were a part, also to some extent start filtering into and going down the alley? A. Yes, sir.

Q. Do you recall whether or not those persons were ahead of you? A. I think they were -- I know there were people ahead of us, and I know there were people behind us.

Q. So that you were definitely conscious of being part of a group?

241 A. Of a crowd.

Q. Moving in the same general direction? A. Right.

Q. So far as you know, because you had parked your own car and had, you think, removed the keys, you and, since Mrs. Daly had ridden with you in the car, presumably you both recall the car was parked in a southerly direction and on the west side of the alley as you would start toward it? A. Yes, sir.

Q. Now, when you came to these vehicles which were coming northward out of the alley -- you have seen diagrams of the alley today -- can you tell us, Mr. Lawrence, whether or not those vehicles were more to the east, more to the west, or approximately in the center of the alley as they -- A. I couldn't answer that, not having -- they were very close to us as we proceeded single-file in a southerly direction. There was only room for one person to move at a time.

Q. They were close to you. Do you recall whether or not cars

were parked on either the eastern or the western segment of the alley?

A. Now you are asking -- I am afraid I can't answer that question with any certainty.

242 The only thing I know about traffic in the alley is that it was moving, or, you know, moving spasmodically.

* * * * *

Q. And as such do you recall whether those vehicles had their lights on? A. I have no firm recollection of lights or not lights, but there was no shortage of light, but I just have no independent recollection of looking at a headlight, sir. They were bumper-like.

Q. Bumper to bumper? A. Yes, sir.

Q. Coming out of the alley? A. Yes, sir.

* * * * *

243 Q. Mr. Lawrence, would it refresh your recollection -- you recall that you made a deposition in this case on June 8, 1960? A. Yes, sir.

Q. In which you were asked this question --

* * * * *

Q. "Would you be able to reflect back and tell us whether it was more or less a long continuous line coming up the alley, or whether it was just one or two cars right near the mouth of the alley at V Street?"

Your answer: "Well, sir, I would be guessing to some degree, but I would say that there were four or five or six cars coming in this direction, and that this was why we pushed so tightly to the left side heading toward our car even though it was on the right side."

Does that refresh your recollection? A. That is correct, and that does refresh my recollection, and it is the very statement.

* * * * *

244 Q. And this moving traffic forced you and Mrs. Daly, as you have expressed it, to "hug" toward the left as you went down the alley?

A. That is correct.

Q. What on the left were you hugging against, Mr. Lawrence?

A. Well, away from -- away from the oncoming traffic is about the best way you could put it, toward the side of the alley.

Q. Not toward other vehicles? A. Oh, no.

Q. So, in effect, what you are doing is following the boundary of the alley line and keeping out of the way of northward bound vehicles?

245 A. Well, I was just going down the open space there, keeping out of the way of the vehicles, yes, sir.

Q. Now, at what point of this trip into the alley, Mr. Lawrence, was it, when you and Mrs. Daly started this single-file method of travel which you have described? A. Well, that is difficult to recall, but I would think almost immediately, but we might have taken two or three steps before she fell.

Q. Started almost as soon as you turned from V Street into the alley? A. That is right, because of the oncoming traffic.

Q. Was there any time during that single-file trip when you were leading the way? A. No, sir.

Q. Was there any reason that Mrs. Daly was ahead of you and leading the way? A. None that I can think of except I usually follow ladies.

Q. You both knew where the car was? A. Yes, sir.

Q. There wasn't any need for you to lead her to the car? A. That is right, sir.

246 Q. Now, was there any time during the process of that trip, if I can use that word again, from V Street to the point at which this incident happened, when a forward movement was interrupted by anything? A. I have no recollection of its being interrupted. It certainly was not a rapid journey. I think we sort of moved as the people ahead of us moved. But if by "interruption" you mean any prolonged period, no, sir.

Q. And it was not necessary at any stage there, to get in and out between any cars at all? A. I have no recollection of that at all, no.

Q. And your recollection of that, I believe you have told us, was that it was practically a straight-line trip from the time you first turned into the alley until the incident happened? A. I remember no deviations from it at all, sir.

were parked on either the eastern or the western segment of the alley?

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Q. And your recollection of that, I believe you have told us, was that it was practically a straight-line trip from the time you first turned into the alley until the incident happened? A. I remember no deviations from it at all, sir.

Q. You did say you walked forward, and partially because you were following other people. Do you know how many people were ahead of you and Mrs. Daly? A. Yes.

Q. But you are conscious that there were "plural" people? A. Yes, sir.

247 Q. And were you conscious also that there were people behind you? A. Yes, sir.

Q. In walking in this position, Mr. Lawrence, about how close were you pacing behind Mrs. Daly? A. A foot, two feet. I would say closer to a foot. Perhaps even closer. We were -- she was just barely ahead of me.

* * * * *

Q. Was there anything ahead of Mrs. Daly that was obscuring any vision that you might have had to have seen beyond her? A. I wouldn't, I observed nothing ahead of Mrs. Daly to obscure her vision.

248 Q. I understood you to say that the first time you became aware of the fact that there was a stairwell, or a hole in this location, was when all of a sudden Mrs. Daly disappeared immediately in front of you?

A. That's right.

Q. How far in front of you was she when she disappeared from your view?

* * * * *

A. One foot.

Q. She was within a foot from you when she disappeared? A. Something like that.

Q. You could see her when she was a foot ahead of you, couldn't you? A. Yes, sir.

249 Q. And there was no stumbling prior to this at all? A. There was just a step, and then there was a step and she was gone.

* * * * *

Q. You had heard no outcry from her? A. No.

Q. No sudden exclamation of surprise? A. Nothing that I remember now, sir.

Q. How did you get down into the hole in which Mrs. Daly had fallen? A. I just jumped in. I then saw the hole and jumped in beside her. I may have lit on the second stair, or something like that.

Q. Were you able to see her so you could jump into the hole with safety without jumping on her? A. Yes.

* * * * *

Q. And you could observe that Mrs. Daly was down at the bottom of that, and you could see her from the top? A. On that -- I think she was on the second -- the second step or something like that.

250 When I say she dis --, I didn't have to look down on her. She disappeared like this, and then I saw her down, is what I am trying to say. It is not that she had gone down some deep hole.

Q. But you could see her? A. I could see her, yes.

Q. And you could see her before you went down in the hole?

A. Of course, and that is why I went down there.

Q. Could you see steps before you jumped down in the hole?

A. I must say at that moment I didn't look with any great care about whether there were steps I could run down or just jump over that ledge, which I did.

* * * * *

THE COURT: Did you say "ledge"?

THE WITNESS: I said "ledge", Your Honor.

* * * * *

BY MR. RYAN:

Q. Were you able to see that ledge? A. At that instant, yes.

* * * * *

251 Q. As a matter of fact, Mr. Lawrence, as you proceeded along this route you had no difficulty in seeing at any time, did you, sir?

A. I had no difficulty in seeing, no, sir.

MR. RYAN: I have no further questions.

MR. ARNESS: I have just one question, Mr. Lawrence.

CROSS EXAMINATION

BY MR. ARNESS:

Q. The five or six cars that you have told us about that were coming in a northerly direction out of that alley, as you were walking along either if they were passing you or you were passing them, can you give us an approximation as to how far away from your path those moving cars were? A. It would be an approximation, but I would say six inches to a foot. Just enough to be out of their range.

Q. So surely there was no parked cars or anything else separating your path from the path of the moving cars? A. There was certainly none in my recollection, sir.

* * * * *

252 THE COURT: Mr. Lawrence, just before Mrs. Daly fell what if anything was on your left?

THE WITNESS: Well, my recollection, Your Honor, is that there were some parked vehicles in the filling station area.

THE COURT: Were you beside parked vehicles when she fell?

THE WITNESS: No. No. We would have just passed that point, sir.

THE COURT: Then what was on your left, if anything?

THE WITNESS: A part of the filling station structure.

THE COURT: A wall?

* * * * *

253

CROSS EXAMINATION

BY MR. WELCH:

254 Q. Do I understand that it is your testimony, sir, that just before this fall occurred Mrs. Daly was last walking between the left side of the parked automobile and the back wall of the building? A. No, sir. It is my testimony that Mrs. Daly was to the left of vehicular traffic moving northward, which is my recollection.

* * * * *

255

VIRGINIA LEE RILEY

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASKEY:

* * * * *

Q. What is your occupation? A. I am an attorney.

* * * * *

257 Q. Would you tell us what route you took going back to where Mr. Smith had surrendered his car to an attendant? A. We left the stadium and walked from Georgia Avenue down to V Street, and into the alley to approximately the place we had left the car.

* * * * *

258 Q. Now, at the point where you entered the alley, were there people ahead of you? A. Yes. I was following Mr. Smith. I couldn't tell you how many people were ahead of us, but there were several.

* * * * *

A. We were walking in single file, because there was only a very narrow area in which to walk.

Q. And how far did you progress before something happened, and then tell us what it was that you observed happen? A. After I had taken 259 perhaps one or two, or maybe three steps into the alley, Mr. Smith said something to the effect of "Watch out, someone has fallen," and I stayed right where I was, because it was very dark. I couldn't see too much of what was going on, but Mr. Smith left me to see if he could go to assist the person who had fallen.

* * * * *

263 Q. Now, what could you observe about the hole into which she had fallen, as you approached it at that time, with respect to its being guarded, unguarded, light, covered, or obstructed? A. When I first heard Mr. Smith say "watch out" I could see nothing because it was very dark and there was definitely no light that would show that there was any stairwell or hole of any kind. It took me approximately two or three

steps forward before I could see anything that was occurring at the stairwell. I was nearly at the edge of the well before I could see that there was any hole or before I could see the people, Mr. Smith and the 264 lady's escort, who were helping her from the stairwell.

* * * * *

CROSS EXAMINATION

BY MR. RYAN:

* * * * *

267 Q. As you started into the alley, Miss Riley, I think you told us on your direct examination that you had gone about two or three steps when Mr. Smith made an exclamation that "somebody has fallen up above"; is that right? A. That is my recollection.

Q. And those two or three steps that you refer to from the V Street entrance into the alley? A. Yes.

Q. Now, on further direct examination you characterized the ex-
268 clamation of Mr. Smith as "watch out". Did Mr. Smith say "watch out"? A. It was words to that effect. He might have said "look out". He was warning me, in effect, that someone had fallen and I should be on guard.

Q. He was warning you that someone had fallen. You hadn't seen anyone fall ahead of you at that point? A. No, I had not.

Q. Do you know how close behind Mr. Lawrence and Mrs. Daly you were at that time? A. No, I don't; the area was very dark and I really couldn't see.

Q. Now, this area we are talking about at this point is you have just stepped into the alley two or three steps? A. Yes.

Q. Are you telling us it was very dark in the alley when you had only gone in two or three steps? A. I am saying that the alleyway where I was walking was dark; the footing was dark. There was, I assume, some confusion. I don't know how many people may have been ahead of them.

* * * * *

Q. Were the lights on in the gas station at this time? A. I don't recall.

269 Q. Were there any lights, public lights, city lights, in the alley at this time? A. I don't recall that. My recollection is merely that this was a very dark area in which to proceed.

Q. You were conscious of that as soon as you started into the alley? A. I believe so.

* * * * *

Q. Were you able to see either over or beyond Mr. Smith as he proceeded ahead of you down the alley? A. I don't recall. I don't have any recollection as to looking ahead.

* * * * *

270 Q. Now, in connection with where you were walking, you were in the alley? A. Yes.

Q. And did you at all times remain walking in or on the alleyway? A. To the best of my recollection.

Q. What was to your right, if anything, either moving or stationery, as you proceeded down the alley single file? A. I recall one lane in which there were moving cars. I don't mean a great many, but I remember there was a lane in which cars were moving to leave the parking lot to get to V Street. I recall the next lane of the alleyway held parked cars.

Q. Now, my question was premised upon "to your right". Are you telling us that two lanes were to your right, one moving and one blocked?

A. That is my recollection.

Q. The parked lane was which way, furthest to your right? A. Yes, sir.

Q. And that would be, if you know directions, that was to the west side? A. Yes, sir.

* * * * *

272 Q. So starting from that point we have a line of parked cars on the right hand side of the alley and we have a line of moving cars coming toward you out of the alley; is that right? A. Yes, except I don't think I would describe it as a line of moving cars. It was a line in which

there may have been one or two cars moving to the point that we could not safely walk in that lane; we had to walk close to the building.

* * * * *

Q. Now, that alley we are speaking of, what is your best estimate as to how many lanes of cars it will accommodate? A. I would think only two lanes.

Q. And that would have been utilized on this occasion with one lane parked on the west side, and the other lane moving coming toward you? A. Yes.

273 Q. How much space did that leave in the alley for you and Mr. Smith to utilize in walking as you were in a southerly direction? A. My guess would be about three feet, but it is purely a guess.

* * * * *

274 Q. Was there anything parked on the Sinclair Station property which would narrow down the area left open for pedestrian traffic? A. It may be. I don't have any independent recollection.

Q. Do you have any independent recollection of any motor vehicles being parked on the left side of the alley, down which you and Mr. Smith were traveling? A. I don't remember that.

Q. You have no recollection, I presume, of any particular car which stood out differently in any posture, or any manner of parking, from any other vehicles parked in the alley? A. No, I do not.

Q. When you and Mr. Smith proceeded into the alley was it necessary at any time, as you and he walked southerly, to change your course -- turn or twist in any manner? A. I don't recall.

Q. It is your best recollection that you walked in a reasonably straight line from the time you started in the alley until when you came to the scene at which Miss Daly was injured? A. I do not remember.

Q. Do you recall as Mr. Smith made this exclamation -- first of all, you stayed where you were. You didn't go ahead until I could see 275 him assisting Mrs. Daly from the areaway. I would say three minutes, maybe not that long.

276 Q. Did he, when he made this exclamation and went toward the stairwell, did he run? A. I beg your pardon?

Q. Did he run or did he walk? A. I don't know.

* * * * *

282 CROSS EXAMINATION

BY MR. ARNESS:

* * * * *

283 Q. The filling station premises I believe you testified that you have no recollection of the fact that they were not lighted? A. I don't recall that.

* * * * *

284 Q. Now, I believe that you have testified that when you and Mr. Smith turned into this alley that you went about two or three steps when this warning was given you and you stopped; is that correct?

* * * * *

A. When the warning was given I stopped immediately, I didn't go any farther.

Q. Right. A. I believe I had gone two or three steps into the alley before the warning was given.

Q. And prior to the time that you had taken those two or three steps had you noticed cars coming out of the alley? A. I do not remember. All I remember is that there was a line in which there were at some time moving cars, so that it was impossible for a pedestrian to walk safely in other than a very narrow area of the alley.

285 Q. I take it you noticed this before the warning was given and before your attention was drawn to the fact that an accident had happened?

A. Yes; that is right.

Q. So I take it then that you noticed this either as you were approaching the entrance to the alley or as you were entering into it?

A. That is right.

* * * * *

286 Q. You do recall, though, that there were two lanes of traffic in that alley -- the lane closest to you, or to the east, was one that was for moving cars, and the one close to this garage or to the west, was parked cars? A. That is the best of my recollection.

* * * *

287 Q. When you entered the alley and took those two or three steps, were you between the service station premises and the cars that were parked in the service station premises, and this line that was for moving cars? A. I was between the service station and the line of cars. I have no independent recollection of cars being parked in the service station. There may have been. I don't remember.

Q. Then aside from that, the position that you were in as you entered the alley and where you were when you received the warning, was that relatively close to the line in which the cars were moving but far enough away from it so that you were in no danger of being struck by the moving cars? A. Yes; that is right.

Q. But in passing, they passed you to your right in fairly close proximity? A. Yes.

* * * *

288 Q. I understand, Miss Riley, that you have told us that you don't have an independent recollection of these cars, but I am asking you now, you have no recollection of going in between two lanes of parked cars, do you? A. Oh, I see. No, because the lane to my right was, as I recall it, the lane where there would be moving cars coming.

* * * *

Q. The only obstruction that you are aware of was on the left side of this alley, as you face it, or on the east side of the alley; the only obstructions were moving cars that would occasionally come out that lane.

289 Isn't that correct? A. That is my recollection.

* * * *

291 Q. * * * When you were asked the position where you were when Mr. Smith gave the warning, your intention was to indicate a space two or three steps from either V Street or the sidewalk in that area, isn't that correct? A. Yes.

Q. * * * Now, when this warning was given you by Mr. Smith, of course your attention was then drawn to the area, the same area that Mr. Smith's attention was drawn to; was it not? A. Yes.

Q. And you stood there waiting while Mr. Smith went up towards it and, as you said, went out of your view? A. That is right.

Q. And while you were standing there your attention remained riveted to that spot so that you attempted to observe from that spot everything that you could observe, didn't you? A. That is right.

292 Q. Now, while you were in this area and while you looked at this area where the fall occurred, was there any automobile obstructing your vision between the place where you were standing and the place where the fall occurred? A. I have no recollection of it.

* * * * *

Q. Well, certainly in answering Mr. Ryan's questions about when Mr. Smith went up there and when he got to the place where the accident happened, if there had been an automobile that he had gone around or that caused him to disappear from sight, you would recall that, don't you think? A. I think I would have.

* * * * *

296 Q. At the time Mr. Smith gave you this warning, how far in front of you was he? A. I believe perhaps a step or perhaps a step and a half, perhaps two steps.

297 Q. And as near as you can recall his words were "Watch out; someone has fallen"? A. Yes.

Q. So that, Miss Riley, from the position that you were, two or three steps into the alley, he would then have been three or four steps into the alley -- from the position of three or four steps into the alley he saw Mrs. Daly fall in this stairwell on up beside this building; isn't that right? A. I don't know whether he saw that or whether he heard someone say that somebody had fallen. I don't recall hearing any prior warning.

* * * * *

CROSS EXAMINATION

298 BY MR. WELCH:

* * * * *

Q. * * * What is your best estimate of the distance from the sidewalk to the edge of the building? A. My best estimate would be eight feet, but that again is purely an estimate.

* * * * *

302 Q. And if it is eight feet from the inner side of the sidewalk to the edge of the building, you had proceeded about three feet when you stopped; is that right? A. That is approximately my recollection.

Q. Now, in that eight feet of space from the sidewalk to the front walk of the building, is it my understanding that you have testified the alley was dark so that you could not see where you were walking?

A. It was dark.

Q. That is half of it. Did you say it was dark so that you couldn't see where you were walking? A. It was difficult to see.

Q. Could you see where you were walking? A. I think that I could.

* * * * *

303 Q. Do you have any recollection at all of whether the gas station was lighted as though it were open for business? A. No, I do not.

Q. Not one way or the other do you recall whether there was light on the gas station property? A. No, I do not remember.

* * * * *

308 Q. You promptly stopped when Mr. Smith made the remark or exclamation of "Watch out"? Is that right? A. Yes, I did.

Q. Is it your testimony that you remained at that point until after Mrs. Daly was removed from the stairwell? A. I stayed there until --

Q. Yes or no, please.

THE COURT: Can't you answer yes or no?

THE WITNESS: Well, that was not my testimony, no.

BY MR. WELCH:

Q. What is your testimony today as to whether you remained there

until after Mrs. Daly was removed, or whether you didn't remain there?

A. I remained there until she was being brought out of the stairwell.

Q. You are sure of that? A. That is my best recollection.

309 Q. You have been asked if you recalled your deposition testimony of June 7, 1960. I would like to read a few questions and answers beginning on page 20, and going over on page 21:

"Question: And what was your first recollection that an accident had taken place ahead of you?

"Answer: I recall Mr. Smith saying 'Watch out; someone has fallen', or words to that effect.

"And after Mr. Smith said that, what if anything did you do?

"Answer: I stopped where I was and watched him."

Do you recall those questions and recall giving those answers?

A. Yes, I do.

Q. To proceed:

"Question: And what did Mr. Smith do?

"Answer: He proceeded a short way and found that someone had fallen into an areaway, or I don't know what the correct term would be. It is apparently stairway of some sort at the side of a building. And he got into the areaway and helped the lady up.

"Question: Was Mr. Smith the first one there to help the woman up?

"Answer: I believe her escort helped her also."

310 Do you recall those questions and answers? A. Yes, I do.

Q. Then you were asked:

"Question: Did you walk up to the areaway yourself?"

And you answered:

"I did a short time thereafter. It was still dark, and I didn't want to fall in too.

"Question: Did you walk forward later?

"Answer: Yes, I did.

"Question: How much later?

"Answer: Oh, I would say one or two minutes.

"Question: Was that after Mr. Smith had come back to where you were located?

"Answer: No; he helped her out of this areaway, and up into the alley, and her escort went to get their car, and then I walked over to where they were to see if I could help her, offer her a handkerchief or be of any assistance. I did take her pocketbook."

Now, does that refresh your recollection as to when you went forward to where the stairwell existed? A. I believe that that wasn't as precise as it should have been. I did wait until they were helping her out. I feel sure that I walked forward before her escort actually left to go to get the car.

* * * * *

311 Q. After Mr. Smith said "Watch out", he started to walk forward while you remained standing.

Would you tell the Court and jury whether four or five or six feet ahead of you there was an automobile parked directly in your path?

A. I have no recollection of it.

Q. Well, did you see one there? A. I have no recollection of seeing one there.

Q. Is the answer that you didn't see one there?

* * * * *

Q. What I understand you to say is you don't know now whether you saw one there or not?

* * * * *

312 THE WITNESS: I have no recollection of a car in that position.

BY MR. WELCH:

* * * * *

Q. As you stood there and watched Mr. Smith going forward, there came a time when he disappeared from your view; is that correct?

A. There was a time when I could no longer see him.

Q. Well, did you use the language previously that he "disappeared from your view"? A. I may have.

Q. Well, then, am I correct in saying that there came a time while you stood there and watched him, when he disappeared from your view?

A. Yes.

Q. Can you tell the jury what it was that caused him to disappear from your view? A. I believe it was just because it was dark.

313 Q. Wasn't it because he got down in the stairwell? A. I believe he disappeared from view before he got into the stairwell. I have no recollection of seeing how he got in.

* * * * *

Q. Well, then, can't it just as well be that when he disappeared from your view it was because he had gotten down in the stairwell?

A. Possibly.

* * * * *

Q. And as you walked on down the alley it is a fact, isn't it, that there came a point where you were standing in the alley opposite the stairwell? A. Yes.

Q. And that is the way you eventually reached the stairwell, isn't it? A. Yes.

* * * * *

314 Q. As you walked on down the alley to a point opposite the stairwell, was there any difference in your ability to see where you were walking before you reached the edge of the building and after you passed the edge of the building? A. I believe it got darker as I passed the edge of the building.

Q. When you say you believe it got darker, are you merely toying with words, or do you have a recollection that it got darker? A. I have a recollection of it being darker.

* * * * *

322

Washington, D. C.

Wednesday, November 28, 1962

* * * * *

323

PROCEEDINGS

MR. LASKEY: Mr. Muldrow, will you take the stand?

* * * * *

WILLIAM T. MULDROW

* * * * *

DIRECT EXAMINATION

BY MR. LASKEY:

* * * * *

324 Q. And what business were you engaged in in 1958? A. Service station operator.

Q. Did you own a service station? A. I operated a service station.

Q. Did you operate it under a lease? A. Yes, sir.

Q. * * * --who did you lease it from? A. I leased it from the Sinclair Refining Oil Company.

Q. And where was that service station located? A. 706 V Street, Northwest.

* * * * *

Q. How long did you operate that service station? A. From '57 through '59.

Q. Had it been a service station before you took it over?

A. It was.

Q. Do you know who operated it before you had it? A. Theodore Miles.

Q. Do you know how long he had it? A. Approximately two years.

* * * * *

328

BY MR. LASKEY:

Q. Before June of 1958 did you park cars in areas other than the filling station property? A. No, sir.

330

BY MR. LASKEY:

Q. Showing you what has been marked as Plaintiff's Exhibit No. 6 for identification, I will ask you if you recognize that as the lease under which you occupied this property? A. It is, sir.

Q. And the date of that instrument is what? A. December 5, 1957.

BY MR. LASKEY:

Q. Then this is the lease that was in effect in June of 1958; is that right? A. It is.

THE COURT: Then the lease covers property other than that owned by the Toomey estate?

332 MR. RYAN: Yes, sir.

MR. ARNESS: But not insofar as relevant to this case, Your Honor.

MR. RYAN: That is right, not insofar as this case is concerned. The property in this case was owned by the Toomeys. We concede that.

BY MR. LASKEY:

Q. Was any property which you used in connection with your service station, or with your parking operation, located on the other side of the alley from the gas pumps? A. Was any property that I used located on the other side of the alley?

Q. Yes. A. Yes.

Q. What was on the other side of the alley? A. Lubricating room.

333

BY MR. LASKEY:

Q. What was that lubricating room used for on the days of ball games, sir? A. That lubricating room was used for on the days of ball games, for anything that I wanted to use it for, because it was parking and that was space used.

336

BY MR. LASKEY:

* * * *

337

Q. Now, showing you what has been marked in evidence as Plaintiff's Exhibit 2-A, you recognize that as being the alley area adjacent to your station, do you not? A. I do.

Q. And the lubricating room to which we have had reference is just barely shown along the right-hand side of that exhibit, or picture?

A. It is.

* * * *

338

BY MR. LASKEY:

Q. And that lubricating room is the one you have been referring to as the place where you would park cars on the occasion of games and athletic events at the stadium? A. If it was empty.

* * * *

Does this photograph, Plaintiff's Exhibit 2-A, represent the condition of that area as you knew it to be on June 12, 1958? A. To the best of my knowledge, yes.

Q. Directing your attention particularly to the stairwell which went down off the alley into the lower part of the building, was that in that condition on June 12, 1958? A. Yes, to the best of my recollection.

* * * *

340

BY MR. LASKEY:

Q. Mr. Muldrow, was there any electric light on the outside of that building at or near the stairwell? A. At or near the stairwell?

Q. On the outside of the building. A. There were no lights on the building over the door, but there was a light facing the building, flood light, which would show light down on the door.

Q. Where was that flood light? A. On the top of the garage, one at each end of the garage.

Q. Do you see them there? A. I do. Right here is one (pointing).

Q. You are pointing your finger to a portion of the building, and I will ask you to take the pencil again and put an "F" at the point where you say.

* * * *

341 MR. WELCH: Now, for the purposes of clarification, Your Honor, may it be shown that he said "on the garage", but he is actually putting it and referring to it on the building that he called the lubricating shack.

MR. LASKEY: That is correct, and I think the record should show it.

THE COURT: All right.

Show it to the jury.

* * * * *

345 MR. RYAN: Object to that, if the Court please.

There is no testimony here that I have heard from any plaintiff's witness that indicates any part of the coping had anything to do with the fall which the plaintiff sustained. She didn't stump her toe against it; didn't bump into it. She stepped right from a plain level into a hole.

THE COURT: Overruled.

* * * * *

346 BY MR. LASKEY:

Q. Now, directing your attention again back to 2-A, can you point out for us on that picture where the line is between the property you leased from Sinclair and the alley? A. I can't point out the line because I have never seen the blueprint. So for me to point it out I would have to see the blueprint, and know it.

Q. Now, I understand your testimony from your familiarity with that property you don't know where the property line between the land you leased and the public alley was located? A. I don't.

* * * * *

354 (AT THE BENCH)

MR. ARNESS: Your Honor, as I understand the issues in this case, Sinclair Refining Company is being sued only as the lessor of these premises to an independent operator, Mr. Muldrow. That is the issues that are joined in this present trial. However, a long time ago in the complaint Mr. Laskey at that time, before he -- no, Mr. Laskey's predecessor, who came before Mr. Laskey -- did make an allegation to the effect that Sinclair operated this station.

Now, that is not the fact, and I don't think Mr. Laskey intends to proceed on any such basis. But I would like to know at this stage, before I conduct my cross examination of Mr. Muldrow, -- Mr. Welch, who represents Mr. Muldrow, has agreed to stipulate with me to the effect that Mr. Muldrow was an independent operator; that there was no reason for any respondeat superior: under the principal agency theory, and I don't think under this case, under the present trial order, that it is an issue. But I think it is something that should be clarified and would like Your Honor to ask Mr. Laskey that question.

355 MR. LASKEY: I will take the same position taken by Mr. Welch, I have no evidence other than that could be gained from those, and if Mr. Welch is satisfied, I am sure I am.

* * * *

356 MR. ARNESS: On this other, then, as I understand, it is stipulated that Sinclair is only being sued as lessor of these premises.

THE COURT: I don't see how it could be otherwise in view of the lease.

MR. ARNESS: Right. Thank you, sir.

THE COURT: Do you?

357 MR. LASKEY: No, I do not, Your Honor.

* * * *

BY MR. LASKEY:

358 Q. Mr. Muldrow, you have stated that prior to the time you took over as operator under the lease of December 5, 1957, you were familiar with this station and the area around it; is that correct? You knew about it? You had seen it? A. I have seen it.

* * * *

Q. And you had been in there prior to September to have your car serviced or your cab serviced, and get gasoline and things of that kind?

359 A. I did.

Q. Did you see that brick coping at any of those times? A. I didn't notice it.

* * * *

Q. And there wasn't any light there at the stairwell, or light fixture? A. No light fixture.

* * * * *

360 MR. LASKEY: In September of 1956, and before that when you went into that station.

361 THE WITNESS: There was no light fixtures. *

CROSS EXAMINATION

BY MR. ARNESS:

Q. Mr. Muldrow, * * * * *

362 Do you know the name of the man who had the property that went off the alley down there on the right side of the alley that is shown in Plaintiff's Exhibit No. 2-B -- this property down here (indicating)?

A. Mr. Ruppert.

Q. Mr. Who? A. Mr. Ruppert is the name.

* * * * *

Q. And did he conduct a parking operation there, or have someone conduct it for him when games were in progress, in June of 1958?

363 A. No; it was an open lot.

Q. You don't know who did it, then? A. No. As I say, it is solicitors from the street -- anybody.

Q. But you did not, and none of your employees did? A. No.

* * * * *

BY MR. ARNESS:

Q. Referring again to this Plaintiff's Exhibit 2-A, the photograph, and aside from not knowing the technical nature of the claim that the District of Columbia would have with reference to alley property there, where did you as a practical matter treat your property that you operated the station -- in other words, how far down did you use property for parking? A. I parked at the end of the gutter. I stopped at the end of the gutter.

364 Q. At the end of the metal grating that we see in the picture?

A. That is right.

Q. Were any cars parked beyond that point, you would have nothing to do with -- during the game, any cars that might have been parked beyond that point, beyond the gutter, you would have nothing to do with in your station operation? A. They didn't park there. They only moved and stopped and kept moving, because they would be blocking me.

* * * *

Q. Now, we have had some reference to this floodlight that is marked on this picture 2-A. I ask you were there other lights above the bays on this lubrication building and above the signs that were on top of those bays? A. There were two lights; one on each end of the lubricating bay, or building.

Q. Let me call your attention to these series of dots there. Were there also other light bulbs, not floodlights, but also other light bulbs in that area? A. They were bulbs, but they were never working.

Q. So the only lights that you had working were the two floodlights on each end? A. Floodlights.

* * * *

BY MR. ARNESS:

Q. Were the floodlights working? A. Yes.

Q. Did you have them on, on the night of this accident? A. Yes.

Q. Were there other lights on the night of this accident at the time of this accident in the filling station premises? A. All lights were on.

Q. By "all lights", what lights do you mean, specifically, sir?

A. I mean the big neon light at the corner.

* * * *

BY MR. ARNESS:

Q. Were there any lights on the pumps? A. The pump lights

366 were on. We have neon lights on each island of the pumps, and the floodlights on the buildings.

Q. Were the lights in the room that is shown here with the big plate glass window? A. They were also on.

Q. Now, I notice in this picture that there is a smaller one-story part building that comes out on the right end, the one that has that sign

on, "Union Cab Company". Were the lights in that room on the night of this accident? A. No.

Q. Were the lights in the room into which this descending stairwell provided access -- that is what I believe was your storage room, was that the storage room down there? A. Yes.

Q. Were they on the night of the accident? A. No.

* * * *

368 Q. Those floodlights that were in this bay, did you put them in?

A. No.

Q. They were in when you took over? A. Yes.

* * * *

371 **CROSS EXAMINATION**

BY MR. WELCH:

* * * *

372 Q. The front of the lubricating shed, or the front of the garage that is on the west side of the alley, on the north is right close to the sidewalk on V Street? A. Yes, sir.

Q. On the east, the front of it right close to the alley line; is that correct? A. Yes, sir.

373 Q. And how far back does it extend, or how far south does the building extend from V Street along the alley with respect to the open space on the east side of the alley itself? A. I think that garage extends back to the end of the gas station, past the end of the gas station. The gas station went right by the door there, where you are going down in the basement, the building stands back past that. So the floodlight would be shining right down.

* * * *

Q. Come down so that the south end of it would be opposite these two stairways; is that correct? A. Yes, sir; that is it.

Q. Then I take it that the point that you indicated on the photograph where you indicated there was a floodlight located on the garage building, is what would be the southwest corner of the garage building; is that right?

A. Yes, sir.

374

Q. Where I have the "L" almost straight across from the two stairways, there was a floodlight located on the upper corner of the lubricating shed, or the garage building; is that correct? A. Yes, sir.

Q. And that floodlight was lighted that night; was it? A. Yes, sir.

375 Q. And the floodlight from here threw illumination over across the alley so that you had good vision over here? A. I did.

Q. Did it directly light the area where these steps were? A. It did.

Q. Now, where was the other floodlight you mentioned located on this garage building? A. On the north side -- on the north corner of the garage facing the gas station.

376

Q. Now, where the fixtures of these floodlights, the fixture part that held the bulb, were they movable, could you adjust them? A. You mean swing them around one way or the other?

Q. Yes. A. They could be.

Q. Had they been adjusted or fixed so as to throw the illumination and the light in any particular direction? A. No; I didn't need to adjust them. They were just right where I needed them.

Q. As far as you were concerned these floodlight on the evening of this accident were in exactly the same position they had been installed, and fixed, before you took over the premises? A. They were.

377

Q. Is there any question or any doubt whatsoever in your mind as to whether both of those floodlights were lighted on the evening that this accident happened, and at the time that your attention was called to an accident? A. They both were lighted. * * *

378 Q. So the jury will understand precisely what you are talking about, describe the sets of lights at the gasoline pumps separately, so we will know what each was.

* * * * *

A. They were separate fixtures, but they were fluorescent on the top, then there was one with the globe around it, with glass you open and put your lights in and close it, on one side of the pumps, and on the other side of the pumps we had the same thing. So there was actually three sets of fluorescent fixtures on each island.

* * * * *

Q. So you had six sets of the fluorescent fixtures, three on each island, you say?

* * * * *

379 Q. * * * Now, I am sure we have all seen many of these where right on top of the gas pump there is a big globe with a lighted lamp or bulb in the globe.

Did you have those types of globes on top of each of these pumps?

380 A. Yes, sir, I did.

Q. Then there were six of those lights lighted in globes; is that right? A. Four.

Q. Four? A. Four pumps.

Q. In addition to the floodlights and in addition to the tubular neon lights, there were four of these big globe lights on the tops of pumps themselves; is that right? A. Yes, sir.

Q. Were all of them lighted on the station this night at the time this accident happened? A. Yes, sir.

* * * * *

Q. On the night this accident happened were there any automobiles at all parked on the east side of the alley between V Street and these stairways? A. No, sir.

381 Q. You are sure of that? A. I am sure of that.

* * * * *

382 Q. When you took over this gas station from Sinclair under lease I assume you were thoroughly aware of the condition of the stairway; is that right? A. I was aware of the old building what we had.

Q. We are only interested in the stairway there.

When you took the premises over on that lease, you were thoroughly acquainted with the condition of that stairway, weren't you?

A. Yes.

Q. Did you ever do anything to change that? A. No.

Q. Was there any reason why you never did anything to change it?

A. The reason I did nothing to change it was because I wasn't asked to. If anything went wrong, it is usually told by the license inspector, to fix this or that or the other. If I had to fix something, I had to do it, I called Sinclair Oil or called Mr. Toomey.

383

Q. Did you ever call Sinclair or Toomey about fixing that, or having anything to do with it? A. I was never warned about it.

* * * *

384

REDIRECT EXAMINATION

BY MR. LASKEY:

Q. Mr. Muldrow, * * *

* * * *

390

Q. You know the Toomeys, do you not -- Mr. Toomey, sitting here?

A. Yes, sir.

Q. I see Jim is not here today.

Do you know Mr. John Toomey? A. Johnson?

Q. John Toomey? A. Oh, yes.

391

Q. Does he park on your lot? A. Yes.

Q. All the time you were operating there? A. What do you mean, all the time. Only when he went to the ball game.

* * * *

396

CROSS EXAMINATION

BY MR. ARNESS:

* * * *

Q. Calling your attention to this sign you talked about up at the corner of Georgia Avenue and V Street, that was a tall sign, wasn't it? A. Yes, sir.

397

Q. And did it have on top of it two floodlights? A. I can't remember whether it was one or two, but I think it was two.

Q. And weren't those floodlights directed backward so that when they were lighted, shown in this direction toward the alley?

A. They were.

Q. And weren't those fairly large-sized floodlights? A. Yes, sir.

Q. When they were on did they shine back as far as the lubrication shed? A. Yes, sir.

Q. Were they on the night of this accident? A. Yes, sir.

* * * *

398 THE COURT: * * *

Now, there is a little space between the sidewalk in front of the building proper and the grating that extends to the grease trap. Do you see that little space?

THE WITNESS: Yes, sir.

THE COURT: Was a car parked in that space at the time you had your attention called to the fact that somebody had been injured?

THE WITNESS: You mean right at the end of the building?

THE COURT: Right at the end of the building.

399 THE WITNESS: No, sir. It is not large enough to get an automobile in there.

THE COURT: It is not?

THE WITNESS: No, sir.

* * * *

400 BY MR. WELCH:

Q. Was there any automobile parked in that space this night at the time your attention was called to an accident? A. No, sir.

* * * *

401 JOSEPH G. POTTS

was called as a witness and, having been first duly sworn, was examined and testified as follows:

DIRECT EXAMINATION

BY MR. LASKEY:

* * * *

Q. What is your occupation? A. Branch manager for Sinclair Refining Company.

Q. For how long have you held that position? A. Two and a half years.

Q. Did you have any connection with the Sinclair Refining Company in June of 1958? A. Yes, sir, I did.

402 Q. What connection was that? A. Real estate manager in Washington.

Q. Are you familiar with the property at Georgia Avenue and V Street which has been discussed in this trial? A service station?

A. Yes, sir.

Q. Did you negotiate with the owners of that property for the acquisition of a leasehold interest by the Sinclair Company? A. Yes, sir, I did.

* * * *

BY MR. LASKEY:

Q. Showing you Plaintiff's Exhibit No. 7 for identification, I will ask you if you are familiar with that lease? A. Yes, I am.

Q. And that is the lease you negotiated? A. That is correct.

Q. Was that the first time the Sinclair Company had leased this particular property? A. No.

403 Q. When did the Sinclair Company lease this property first?

* * * *

THE WITNESS: I am not sure of the date. It was, I believe, five years before, I think in '51.

BY MR. LASKEY:

Q. This was a continuation of the occupancy under a new lease; is that correct? A. That is correct.

Q. There has been some mention by counsel for the Toomeys, that your company submitted a list of 27 items which had to be done before this lease was entered into; is that a fact? With respect to repairs to the property? A. I don't know if it was 27 items, but there were several items. Whatever is in the lease.

Q. Who prepared that lease? A. That was drawn up by us, by our company.

404

BY MR. LASKEY:

Q. Were you familiar with this particular property at the time the lease before you was signed and executed? A. Yes, sir, I was.

Q. Had you inspected it? A. Yes, sir.

Q. Were you familiar with it -- showing you 2-A, 2-B and 2-C, were you familiar with -- strike that.

Do those pictures fairly reflect the condition of the property at the time you negotiated the lease as to the areas shown in the photographs?

A. Yes, they do.

Q. Directing your attention specifically to the absence of any railing at the stairwell, that was the condition as it existed as of September 6, 1956? A. That is right.

Q. And with respect to the absence of any lighting fixture on the wall of the building? A. That is correct.

Q. And with respect to the absence of any cover, any barricade, or any warning concerning the existence of that stairwell? A. That is correct.

Q. Now, can you look at that picture, and tell us from your observation of the picture, coupled with your other knowledge of the property, where is the dividing line of the Toomey property and the public alley? A. It is the drain.

Q. The drain is the actual dividing line? A. That is to the best of my knowledge now. That is to the best of my knowledge.

Q. Well, you are familiar with the fact that that drain --

THE COURT: You are talking about the iron grating?

MR. LASKEY: The iron grating.

THE WITNESS: Yes, there is a grating there.

406

BY MR. LASKEY:

Q. Assuming I am now at the sidewalk corner on V Street, and I am walking right astraddle of that iron grating, that would lead me to the building itself, would it not, the line of the building? A. That is correct.

Q. And at a point before you get to the little sidewalk area in front of the building itself -- platform area? A. Yes.

Q. That grating takes a turn, right angles, to the west, and goes three to four feet, possibly three feet.

MR. ARNESS: Possibly two feet.

BY MR. LASKEY:

Q. Two feet to three feet, or more. A. Yes.

Q. Does the property line turn, too, or do you know? A. I don't know.

Q. Then you really don't know where the property line is?

407

A. No.

Q. And by looking at the property itself or the photograph you cannot tell where the public alley stops and the Toomey property begins; is that right? A. No.

Q. That is not right, or you can't tell? A. Would you read the question again, please.

(Pending question read)

THE WITNESS: No.

BY MR. LASKEY:

Q. No, you can't tell, or no, it is not right? A. No; it is not right.

Q. What is right? A. The drain, the covered drain, is the property -- is the property line. That is to the best of my knowledge.

Q. I just thought you told me you didn't know? A. What?

Q. I thought you just told me you didn't know. A. I ---

Q. Didn't you just tell me about three minutes ago that you didn't know whether the drain was the property line?

MR. ARNESS: The witness is entitled to give his best knowledge, Your Honor.

408

THE COURT: Yes.

THE WITNESS: This is my best knowledge, that this is the line.

BY MR. LASKEY:

Q. Where did you get that knowledge from? A. I just assumed it in inspecting the piece of property.

Q. Just an assumption? A. That is correct.

Q. For your testimony under oath that is where the property line is? A. No. No. To the best of my knowledge that is where it -- that is where the property line is, and that is what I am testifying to.

Q. Because you just assumed it because you looked at it and saw the iron grating there; is that it? A. This is correct.

Q. Do you know whether the Toomey property line from V Street to the south corner, the south line, is a straight line or a jogged line?

A. I don't know.

* * * *

410

BY MR. LASKEY:

Q. Showing you, Mr. Potts, the Exhibit for Plaintiff's numbered 7, and the next to the last page thereof, that is your signature, as a witness to the signatures of John J. and James C. Toomey, is it not?

A. That is right.

411

Q. Directing your attention to page 4 of the lease agreement, does that list there numbered with the smaller letters A through K, on that page, and L through P on page 5, constitute the list of items to which we had reference before the noon recess? A. Yes, sir.

Q. And those items were incorporated into the lease as repairs or work to be done by the lessors at the insistence and request of the Sinclair Refining Company; is that correct? A. That is correct.

Q. Do any of those items encompass paving?

THE COURT: Encompass what?

MR. LASKEY: Paving on the surface of the leased property.

THE WITNESS: No, they don't.

BY MR. LASKEY:

Q. Do any of the items encompass repairs to the broken brick at the stairwell? A. No, they don't.

Q. Do any of the items encompass the erection of a guard railing or barrier between the stairwell and the rest of the property? A. No.

412

Q. Now, the stairwell itself was a part of the property which you, on behalf of the Sinclair Company, considered you were leasing from

the Toomeys and, in turn, leasing to Mr. Muldrow; is that correct?

A. That is correct.

* * * *

CROSS EXAMINATION

BY MR. RYAN:

Q. Mr. Potts, what was your title again with Sinclair in 1956 when this lease was being negotiated? A. I was real estate manager.

Q. As such what did your duties encompass? A. The negotiation and submission of real estate proposals for the company's management.

Q. Did it also encompass, Mr. Potts, the inspection of properties for possible lease to the company? A. Yes.

Q. On that, to insure there the condition and suitability to the company's purposes? A. Yes.

* * * *

413

Q. I believe you told us you have some thought or recollection or perhaps understanding that Sinclair had leased this station from the Toomeys as early as 1951? A. Yes.

Q. When you first came with the company it was then under lease -- this property was then under lease to Sinclair? A. That is correct.

Q. And was there then in existence a lease between the Toomeys and the Sinclair Refining for this property? A. Yes, there was.

Q. That lease was to expire when, if you recall? A. In 1956.

Q. It has been pointed out that there are a series of items of either repair, renovation or restoration which are contained in Plaintiff's Exhibit here today, I mean the existing lease in 1958. Did you have anything to do with the submittal of those items for incorporation in the lease as part of your job? A. Yes, I did.

Q. Were those items inserted in the lease after a physical inspection of the premises made by you prior to negotiating a new

414

lease? A. Yes.

* * * *

BY MR. RYAN:

Q. In your opinion these items which you listed, and had incorporated in the lease, placed the station in a satisfactory condition for

415 a new lease for Sinclair Oil for five more years; didn't it? A. That is correct.

Q. As a matter of fact, this lease contained a provision that unless these repairs were made by the first of January Sinclair had the right to cancel it and refuse to go ahead? A. That is right.

Q. Now, assuming, Mr. Potts, if I may, that this lease was entered into, executed on September 13, 1956, and obliged repairs to be made by the first of January, 1957, did you in that intervening interval visit the premises again and inspect the premises to see whether or not this work had in fact been done? A. Yes.

Q. And did you determine it had been done? A. Yes.

Q. And that the premises by January 1, 1957, were in a satisfactory condition for acceptance by Sinclair under the terms of the lease?

A. That is right.

Q. Now, do I understand that you did or did not examine the stairwell we are talking about prior to September 13, 1956? A. I did.

Q. And can you tell us when, prior to September 13, 1956, you inspected it, sir? A. No, I can't recall the exact date.

416 Q. And was it in a condition prior to September 13, 1956, similar to that condition which is reflected in Plaintiff's Exhibit 2-B in here today? A. Yes.

Q. You do not know how long prior to September, 1956, it had been in such condition? A. No.

Q. No requirement was made in the lease agreement, or otherwise, by Sinclair as an addition to the Toomeys, to make anything -- any change to that stairwell before September 13? A. No, sir.

* * * * *

417 BY MR. RYAN:

Q. Nor was there any requirement in the lease agreement to make any changes to the stairwell? A. That is right.

* * * * *

BY MR. RYAN:

Q. Did Sinclair any time from January, 1957 until June 12, 1958,

when Mrs. Daly sustained her injuries at this location, request that the Toomeys do anything in connection with this stairwell? A. No.

418

CROSS EXAMINATION

BY MR. ARNESS:

Q. Did Sinclair actively operate that station at any time to your knowledge? A. No.

Q. Did it ever at any time have any active control in the day to day operation of these premises? A. No.

MR. LASKEY: I think we have stipulated these facts at the Bench, Your Honor.

THE COURT: I thought so, too.

419

BY MR. ARNESS:

Q. Now, Mr. Potts, there has been mention made of several of these items on either page 4 and page 5 of this lease.

How were these items that are included in the lease arrived at? A. They were the results of negotiation with the Toomeys.

423

BY MR. ARNESS:

Q. Do you have any idea as to the age of this building? A. No.

It is old.

424

Q. What was its general condition apart from the area where the office of the service station was located and the area around the pumps where the customers ordinarily would be? A. It was an old property.

Q. Well, that doesn't quite answer my question. I asked you what was the condition apart from this area where the customers would ordinarily be. Apart from that, in other areas. A. I see. It was old.

Q. Well, that doesn't say what the condition was. Some things are old, and are in pretty good condition.

What was the condition of it other than in this area? A. Well,

it was not in good -- at that particular time it was not in good condition.

* * * * *

425 CROSS EXAMINATION BY MR. RYAN:

Q. Mr. Potts, when if ever during the term of this lease did Sinclair ever request any authority from the Toomeys to make any structural changes to the premises? A. We did not request any.

426 Q. Did you during the term of that lease ever see or consider any structural changes that you desired to make? A. No, we did not.

* * * * *

429 BY MR. RYAN:

Q. You don't have any other list other than what now appears in this lease? A. That is correct.

Q. And all of these items were done at your request to upgrade this property? A. That is correct.

Q. Which was an old property to start with, to increase the sales which Sinclair would anticipate? A. That is correct.

* * * * *

431 BY MR. RYAN:

Q. I asked you whether or not Sinclair had in mind renting this place or renting this station location to conduct a paid parking?

* * * * *

Q. To sell gas and oil and supplies -- not to park cars -- wasn't it? A. That is correct.

* * * * *

441 CROSS EXAMINATION BY MR. WELCH:

* * * * *

Q. Mr. Potts, before your lease agreement was concluded in September, 1956, were the owners of the premises, the Toomeys, did you inspect these premises with either of the owners or the owners' representatives? A. No, sir; I did not.

Q. Such inspection as you made, you made separately and independently? A. That is correct.

Q. Did you examine this stairwell? Did you look at it? Did you see the condition it was in before you signed up the lease?

A. Yes, I saw it.

* * * *

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BY MR. WELCH:

Q. Then let me put it to you this way -- they may not all object to this:

When you examined those premises before your lease was executed, did you observe that there was no rail around there? A. Yes, sir.

Q. Did you consider that those steps were on the property you were leasing from Toomey? A. Yes, sir.

Q. And did you take into consideration that the steps were near the alley? A. Yes, sir.

447

Q. Did you give any thought to putting a rail around the steps?

A. No, sir.

Q. Did you ever give any thought to putting a rail there? A. No, sir.

Q. So far as you know, you never would have given any thought to it unless Muldrow came and mentioned it to you, is that it? A. That is about right.

* * * *

THE COURT: Mr. Potts.

THE WITNESS: Yes, Your Honor.

THE COURT: Has there been any change in the paving of the gas station since September of 1956?

THE WITNESS: No, Your Honor.

THE COURT: All right. That is all I wanted to ask you.

* * * *

JOHN J. TOOMEY

DIRECT EXAMINATION

448

BY MR. LASKEY:

Q. State your full name, please. A. John J. Toomey.

Q. And you are the John J. Toomey who is one of the defendants in this suit, and is a trustee under the will of Ellen Toomey? A. Yes, sir.

Q. And as such own the property at Georgia Avenue and V Street, Washington, D. C. A. Yes, sir.

Q. Do you know the lot line on the west side of that property between your property and the alley, the location of it? A. Well, I will tell you the truth, Mr. Laskey: I have seen drawings of it many times, as well as pictures on a plat in the plat books, and I have always assumed that it was a straight line. I have never seen the jog in it that this picture shows. And it has always been my impression that the line

449 ran from, say the western extremity of those ascending steps, one straight line to V Street, or to the sidewalk.

Q. And if your understanding is correct a portion of what appears to be here the paved alleyway, is in fact the Sinclair -- rather, the Toomey property? A. Yes, sir. If my impression is correct that is right.

* * * * *

Q. How long is that -- how long, rather, has that lubricating shed been there? A. Well, that was the first structure built. That was put up about 1929 or 1930.

* * * * *

451

CROSS EXAMINATION

BY MR. ARNESS:

Q. Mr. Toomey, part of that building that had the gas station itself on it is much older than 1930, isn't it -- that big building?

A. No, sir. Now, the building itself, the main building, if memory serves me correctly, was built as a new building.

They may have retained some of the former structure, but that was frame ---

Q. Some of the former structure, the frame, as a matter of fact, was used during the Civil War, wasn't it? A. That's right. It was a prison.

Q. Yes. So we are talking now about a hundred years or more ago. A. That went back only about half way down the lot, though. This lot runs from Georgia Avenue back to the alley.

Q. How long has that property been in the hands of the Toomey family? A. There I think my grandmother bought it at the turn of the century.

452 Q. So that all during the time when this stairwell was built, and all during the time you have maintained it, it has always been in

your family? A. That's right.

Q. And over the years, not even back as long as five years ago, but 10 or 15 years ago, you had occasion to visit these premises frequently, didn't you? A. Yes, I did.

Q. And you saw the condition of the stairwell as it has been exhibited to the other witnesses in this trial and the various pictures, on many occasions, didn't you? A. I would say that is correct. I noticed the stairwell. I never paid too much attention to it.

Q. Now, since your visits were frequent, you must have known approximately when it was that this ledge became broken down, didn't you? A. Yes, sir.

Q. And all during the time you had it and all the time you have leased it to various people, you knew when you leased it to them that there wasn't any guard rail there, or anything to protect people from that stairwell? A. That's correct.

Q. Now, how long has it been used as filling station premises? A. The first occupant was a mission station about 1931.

453 Q. And has it been used as a filling station ever since then?

A. Ever since.

Q. By various lessees? A. Right.

Q. And it never has had a stair railing on it? A. No, sir.

* * * * *

454 Q. Well, to your knowledge ever since that foundation has been there this stair well has been there connected to it, is that not right?

A. Yes. Originally this was a central -- or contained a central heating

plant for the entire building, including the restaurants up front, and the apartments upstairs.

Q. Now, there are other businesses conducted out of this same building, other than service station, aren't there? A. There were at that time, and there is a restaurant, as I say, up front, but there is nothing on the second floor any longer.

Q. So your interest so far as this piece of commercial property is concerned goes even beyond the leasing of the filling station premises to the Sinclair Refining Company and Mr. Muldrow. It goes to the leasing of it to other people, too, isn't that so? A. You are referring to the entire property?

Q. Yes. A. Yes, sir.

Q. And the entire property -- do I take it from the fact that you have been seated here during the trial, as far as the Toomey interests are concerned, is under your active management? A. That is true, yes, sir.

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Q. Now, there is no question in your mind but that you are not about to fix up every conceivable thing that could possibly be fixed about that building in order to rent it? That is true, isn't it?

A. That is true. It would cost too much today.

458

Q. Yes. So there are certain things that, even though they should be remedied and you would like to have them remedied, but because of cost factors you just haven't done it. Isn't that so? A. Well, actually today it is no longer a service station.

Q. All right. I am talking about a part from what it is used for, where there are certain things, we will say from the year 1955 up until the year 1958, which could have been done and which you would have done if it had not been for the expense factor? A. No, sir, that is not the only reason. We did what we were called upon to do whenever the lease came down to us and whenever, in our opinion, it was part of our agreement, or obligation.

Q. And whatever you considered to be economically feasible?

A. No, sir, because we felt obligated to do certain things.

Q. So you did those things that there was no getting out of, but you wouldn't do the things that there was some getting out of? That is correct, isn't it? A. Well, what do you mean by "getting out"?

Q. You used the word. You tell me? A. All right.

459 If in our opinion a certain change was required and in our opinion it was not justified under the terms of the lease, regardless of who the lessee was, we didn't do it.

Q. Right. A. But we didn't go up and volunteer to do things.

Q. And prior to 1956 and subsequently thereto by virtue of your capacity as trustee, you were the sole owner of these premises?

A. The estate -- yes, the two trustees and the surviving one earlier; right.

Q. So that as far as exercising any dominion over these premises and as an owner, you would exercise the total and exclusive judgment; isn't that correct? A. In which cases, sir?

Q. So far as exercising dominion over those premises as an owner. A. Well, there are no other owners to consider, if that is what you mean.

Q. So then you would exercise the exclusive judgment; isn't that correct? A. As far as ownership, yes, sir.

Q. Now, we talked a little bit before about this stairwell. There is no question in your mind that that was a structural part of the premises?

460- 479 A. There is a question in my mind, yes, sir.

Q. There is? A. I think it is something that is tied to the structure, like the ascending stairway.

Q. Well, let me ask you this -- the ascending stairway?

I am talking about the descending stairway, the one I showed you in the picture. A. Yes, sir; I was just using the other one as an example.

Q. Let's use the one I showed you as an example, the one that is tied right into the foundation of this building under the parging.

Any question that the one shown in 2-C is a structural part

of the premises? A. There is, yes, sir.

It is something to me that is adjacent or appended to the structure.

Q. Not a necessary incident to it? A. An incident definitely.

Otherwise, there would be no ingress or egress without it.

Q. In other words, without that structure of that stairwell you could not use and get into that room, could you? A. That's correct.

Q. And isn't it a fact that you as owner of this property treated 480 that as a structural part of the premises? A. The question never came up whether it was structural or not until today, sir, so that we didn't treat it one way or the other.

Q. Without mentioning any dates, I ask you if it is not a fact that at some point the issue did arise with reference to whether this was the structural part of the premises or not?

MR. RYAN: Object to that as being too indefinite, if Your Honor please -- "at some point." When?

THE COURT: Overruled.

THE WITNESS: I don't believe it ever did, sir. There was never any discussion with relation to it.

MR. ARNESS: May we approach the Bench?

THE COURT: Yes.

(AT THE BENCH)

MR. ARNESS: Your Honor, without approaching the Bench and telling Your Honor what I intend to do now, I wouldn't do it.

Under the opinion of this Court in *Fine against Giant Food*, I have a clear right, since there is a dispute over the control over this premises, whether it is a structural part of the premises or not, over which the owner reserved the right of control, to bring out the fact on that issue only that the owner did in fact after this accident install a railing there.

481 This is the only exception to the rule against subsequent repairs, and it is clear that when it is utilized between the parties, and the party has done it after the accident, that on the issue of whether or not he had the obligation to do so, that testimony is admissible and relevant.

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MR. RYAN: * * *

I understood, and I have agreed, and I do agree, that in connection with the cross claims which exist in this case, whether they be from exoneration or whatever, that we have stipulated and agreed that after this accident the Toomey trustees put up a railing which appears in some of the exhibits we have objected to, and which Your Honor at that time didn't permit to go in evidence.

482 And that stipulation stands. I agree we put them up after the accident.

* * * * *

515 Washington, D. C.

Friday, November 30, 1962.

* * * * *

523 THE COURT:

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524 Well, I will sustain the objection to the tendered testimony.

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525 CROSS EXAMINATION (Resumed)

BY MR. ARNESS:

Q. Mr. Toomey, I think I had concluded most of the questions I had in mind asking you, but I would like to ask you just one other:

You told us that this property had been in the hands of the Toomey family for some time, and that this lubrication building was the first to be built? A. That is true. You see, the original buildings were frames, and before they were converted the lube shed was built; that's correct.

Q. And then subsequently this building that now has in it opening into which the stairwell that is involved in this case goes, was constructed -- afterward? A. That's right.

Q. And that was in the Toomey family hands at that time?

A. Right.

526 Q. Except for wear and tear incident to the years, was that stairwell in the same condition structurally at the time this accident in June 1958 as it was when it was constructed? A. I would say so, yes, except for the condition on the side there.

Q. Yes, but I am talking about wear and tear only. A. Yes, that's right.

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RECROSS EXAMINATION BY MR. WELCH:

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Q. Only one or two other questions:

You say that originally there was a light fixture in the rear wall of the gas station building above the ascending stairway? A. Yes, sir.

Q. What type of fixture was that? A. Well, as I say, it was on an arm that came out of the wall. It was like pipe, and at the end of the pipe was the light, or the bulb, and surrounding that was some kind of shade, a reflector to throw the light down and outward. Whether that was knocked off by a truck or children, I don't know, but it disappeared.

Q. After it had disappeared, or had been dismantled or knocked off, whatever the situation actually may have been, did you have an opportunity to look at and observe the rear of the building at any time and learn that that light had been broken or removed? A. Well, I guess at one point we did, but the difficulty was that when that building was first ---

Q. Just a minute, Mr. Toomey.

You think that at one time you did actually learn and observe that that light which had originally been placed by you above the ascending steps, had been removed or broken off? A. Yes; at one time it did

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come to our attention; that is correct.

Q. How long was that before you leased the premises to Sinclair?

A. Well, Sinclair, you see, went in September 1, 1949. Now, whether it was before or after, I don't know.

Q. Could you be sure whether it was in any event prior to the time that Muldrow sublet the premises in December of 1957? A. Well, I would say it was before Muldrow went in.

MR. WELCH: No further questions.

RECROSS EXAMINATION
BY MR. ARNESS:

Q. Would you say it was also before 1956? A. Yes, I believe it was before '56.

Q. But it could have been after 1949, and between '49 and '56? A. Yes; it could have been, very well.

MR. ARNESS: I object to the possibility, Your Honor.

BY THE COURT:

Q. Mr. Toomey, did you ever have an opportunity to observe at night the light reflected on this stairwell from the lights on the adjacent building?

535 MR. WELCH: I object to that as not responsive to anybody's direct examination.

THE COURT: Overruled.

THE WITNESS: Yes, I did, Your Honor.

THE COURT: What was the condition of the lighting at the stair well when those lights on the adjacent buildings were on?

I think they were called "flood lights".

THE WITNESS: Flood lights? There were pretty strong flood lights on the building, at the Georgia Avenue, and then down about the alley end, and then there were the lights, of course, at the design shows on the garage. When they were on, they lit up the alley pretty well in that area.

* * * * *

BY THE COURT:

Q. I particularly have in mind, Mr. Toomey, the lights shown on Exhibit 2-A, on the lubricating garage immediately across the alley from

536 the stairwell. A. Your Honor, if that light was on it would light up that stairway provided there was nothing in the way to interfere with it, because it came out in a fan, the light itself, and spread, and lighted down to a point beyond the stairway.

Q. Would a car interfere with it? A. If it was close enough to the stairway. In other words, if one was parked in front of it, it would.

Q. I see.

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539 CROSS EXAMINATION BY MR. WELCH:

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BY MR. WELCH:

Q. You suggested that if there was an obstruction, of course the effect of the lighted fixture would be eliminated or modified. A. Well, what I meant by that was the light ---

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BY MR. WELCH:

Q. What did you mean when you used the word "obstruction"? What did you have in mind in the nature of an obstruction? A. Well, I meant if an automobile was passing close to the stairway, or if one happened to be parked on front of it, that the shadow of that automobile would be thrown on the stairway.

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BY MR. WELCH:

Q. *** When all of the station lights were lighted, the big light on the corner, the big Sinclair light on the corner of Georgia Avenue and V, the lights on the gasoline pumps, the neon lights around the pumps, and the other normal lighting of the gas station per se when it was open for business, regardless of the floodlights on the garage or the lubricating shack A. It was quite well lighted, yes.

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Q. So, even without these lights, the normal lighting of the station would quite well light the area where these stairways exist? A. Yes, they would; that is right.

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THE COURT: All right, Mr. Ryan.

MR. RYAN: Your Honor, on behalf of the defendants Toomey, I at this time move the Court for a directed verdict and submit to the Court as follows: * * *

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BY MR. RYAN:

548 She was not attracted to leave the public alley because there was something to her left that appeared to be a continuation of the public alley, or something erected at or near the alley which led her to believe that it was part thereof. She was led to leave the alley because there

was an obstruction in the alley, over which there is no testimony in this case as to control, who placed it there, who belonged to it, why it was there.

I think the Court may at this stage of the case take judicial notice of the traffic regulations in effect in the District of Columbia which make it illegal to park motor vehicles in an alley.

Accordingly, we have an invalid illegal situation of a car parked
549 in the alley.

When Mrs. Daly reached that situation she then deviated to her left and passed from the public property to the property owned by these defendants.

* * * *

550 That brings us, then, if Your Honor please, to two specific provisions of the restatement of the law of torts. And at first blush they appear to perhaps overlap, but if they are studied and considered carefully I think it would be observed that they do not overlap but that they treat different situations. And I refer Your Honor to Sections 367 and 368 of the restatement of law on torts.

* * * *

552 THE COURT: * * *

* * * *

I don't think there is any doubt about that.

Technically, she is a trespasser.

MR. RYAN: Technically, yes, sir.

THE COURT: Isn't this the exception?

553 MR. RYAN: This would be the exception if she became a trespasser because of something that the person in possession of the property did to lead her to the property by a deception; where the person who owned or operated the property, if Your Honor please, led her from the public way to enter upon the private property under the belief that she was still on the highway.

She does not say she entered it because she thought she was still on the highway. She comes into a situation here where she says she entered it because, when she was on the highway, she met something

that obliged her to turn her course, and turning her course she then entered the private property.

And I say, if Your Honor please -- or I don't say, I submit to Your Honor for your consideration, that this comes within the purview clearly of what is meant by the Section 368 of the restatement.

Section 368 reads -- and this is all technically chargeable with it -- "A possessor of land who creates or maintains thereon an excavation or artificial condition so near an existing highway that he realizes, or should realize that it involves an unreasonable risk to others accidentally brought into contact therewith, while traveling with reasonable care upon the highway, is subject to liability for bodily harm thereby caused to them."

554

The situation thus created is this: That here, and following the language of this section again, the possessor of the land who creates or maintains thereon an excavation or other artificial condition so near -- and this is emphasized, because the opinion I am going to tell Your Honor about and refer to Your Honor is also emphasized -- an existing highway.

By the same token, if Your Honor please, there is no testimony in this case as to when the stairwell was erected.

559

THE COURT: Oh, yes; I don't see any legal difference between creating and maintaining. There may be, but I don't see any.

MR. RYAN: The legal difference is -- what I am trying to point out is that the legal difference is that which is created in the difference between Sections 367 and 368 of the law of torts.

If you both create and maintain this false highway, this thing that has the appearance of a highway, you become liable through the continued maintenance of it.

560

But here, under the circumstances where we are not under the same section -- under 368 -- we are not meeting the same test. We are meeting the test of the creation.

THE COURT: I agree with that. I thought from the opening statement that the testimony would show that she walked along the highway, and the excavation was so near to it that she stumbled into it. That is the impression I had. But the evidence has not shown that at all.

* * * * *

563 MR. ARNESS: May it please the Court, at this time, on behalf of the Sinclair Refining Company I move the Court to direct a verdict in favor of that defendant.

* * * * *

578 MR. WELCH: Well, if the Court please, I want to make a motion for a directed verdict on behalf of the defendant Muldrow.

* * * * *

591 THE COURT: The motions are denied.

* * * * *

592 THE COURT: Gentlemen, do you wish to present any evidence?

MR. RYAN: If Your Honor please, I did want to tender the traffic regulations. Unfortunately, we don't have it right now, but may we stipulate to it.

(Conference among counsel)

I make the proffer and I understand it will be objected to. I would proffer the traffic regulation in regard to parking in this area.

MR. LASKEY: There was no mention of this in the pre-trial order, if the Court please.

MR. RYAN: It was not in the pre-trial order, and Mr. Laskey objects to it.

THE COURT: On that ground alone?

MR. LASKEY: Well, I haven't seen it yet.

THE COURT: Can't you guess what it is about?

MR. LASKEY: Well, I don't know.

THE COURT: Well, whisper it to him, Mr. Ryan.

(Counsel confer)

MR. LASKEY: I would object to it on the ground of relevancy

593 in addition to the fact it is not in the pre-trial order.

THE COURT: I think I know what you have in mind, Mr. Ryan. I don't see its relevancy.

MR. RYAN: I submit it is relevant in the posture of ---

THE COURT: Come to the bench.

(AT THE BENCH:)

MR. RYAN: Plaintiff testified as she proceeded presumably in this public alley on the public highway, that she suddenly was confronted with a motor vehicle and parked.

THE COURT: Yes.

MR. RYAN: The traffic regulation upon which I would rely is the illegal parking of motor vehicles in a public alley.

That is what caused her to change her course and deviate.

I would argue as a matter of law that that is an intervening, efficient cause, creating part of the overall picture, and to which this plaintiff ultimately found herself.

No car, she would have continued directly ahead.

We don't know who parked the car, they are strangers to us.

594 There is no testimony as to who parked that car. We, the same as she, we are entitled to believe that the alley would be free of violations. That is why I think it has some materiality, if the Court please.

MR. LASKEY: It has no materiality than if the van, that caused the traveler to step aside in that Connecticut case, was speeding. That didn't make any difference.

THE COURT: I sustain the objection.

MR. RYAN: Then I will state that I have no further testimony to offer, Your Honor.

MR. ARNESS: The defendant Sinclair Refining Company would like to stand on its motion, Your Honor.

* * * * *

595 THE COURT: Well, all right.

And you still stand on your motion and offer no testimony?

MR. ARNESS: Yes.

* * * * *

THE COURT: I agree with that. I thought from the opening statement that the testimony would show that she walked along the highway, and the excavation was so near to it that she stumbled into it. That is the impression I had. But the evidence has not shown that at all.

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595 THE COURT: Well, all right.

And you still stand on your motion and offer no testimony?

MR. ARNESS: Yes.

* * * * *

MR. ARNESS: Of course, the issues in the cross-claim are to be tried subsequently, to the Court.

THE COURT: Oh, yes.

Now, gentlemen, we have got about 50 prayers here to discuss, and that will take a little while.

* * * * *

603 THE COURT: Well, gentlemen, I have prepared what I believe to be the essential elements of the case. It might aid you if I read to you what I have prepared, applicable to each defendant.

The first element is that the defendant maintained an excavation in the form of a stairway.

The second element is that the defendant maintained near and adjacent to the excavation a condition or situation from which a reasonably prudent person might mistake the boundary of the alley, that is, where the alley ended and the private property began, and mistakenly

604 stray away from the alley in the belief that she was still on it, and fall into the stairwell.

Third, that defendant failed to take reasonable safeguards such as a railing, warning signs, a cover, or illumination, to protect any such person from falling into the stairwell.

Fourth, that such failure constituted negligence and that such negligence proximately caused the plaintiff to fall into the stairwell and sustain injuries.

Now, that is my idea of the essential elements of the case. It seems to me that you are only stating that another way.

* * * * *

609 MR. ARNESS: Your Honor, for the record I would like to state on behalf of the defendant Sinclair Refining Company, that I think Your Honor's statement is a fair statement as representing the claim made by Plaintiff's counsel. I object to it on the ground that I do not think it applies to the defendant Sinclair Refining Company.

THE COURT: Of course, that is a very nice question. It is one that I have given a lot of thought to.

MR. ARNESS: I know Your Honor has.

THE COURT: And I do find some authority -- even though you don't -- which holds it is proper.

MR. ARNESS: Which holds what?

THE COURT: Which holds it is proper to hold the landlord for a nuisance.

The only question is, whether as an intermediary you are a landlord. I can't find any case on that.

610 MR. ARNESS: In those cases Your Honor found, I think the landlord was the owner also.

THE COURT: Oh, yes; that is right.

* * * * *

BY THE COURT:

* * * * *

619 No. 2: Now, Mr. Ryan, I think perhaps you mean to say after the words "lack of lighting" in the third line, that it should be "the lack of lighting from the existing facilities." Isn't that what you mean?

MR. RYAN: Yes, Your Honor.

* * * * *

THE COURT: No; leave the words "lack of light" in.

"Existing lighting facilities." In that he means to raise the point that if the facilities were there, the Toomeys were not responsible because they had no management or control over Muldrow, if he didn't turn the lights on.

MR. ARNESS: I think this instruction equally applies to the defendants Sinclair and I ask leave of Court to adopt them.

620 It does not mention specifically the defendant, but it could be made to.

* * * * *

THE COURT: Yes, it would.

"Existing lighting facilities on the occasion of the accident." "Then it is instructed that no obligation existed upon these defendants."

You mean upon defendants Toomey --

MR. RYAN: It is true that Your Honor does not read the captions of prayers to the jury, but I have captioned all of mine as though I were citing them only for my defendant. That is the reason for that.

THE COURT: Do you object to the reading "upon the Defendants Toomey and Sinclair"?

MR. RYAN: No, Your Honor. All of my prayers have been premised the same way -- where I said defendant or defendants, I have in each instance meant the defendants Toomey. And I have no objection to that being inserted, no, sir.

* * * * *

621 THE COURT: So it will read "that no obligation existed upon the defendants Toomey and Sinclair Refining Company to provide such lighting".

MR. RYAN: Yes, Your Honor.

* * * * *

628 THE COURT: * * * Now, I will take up Mr. Arness' prayers.

MR. ARNESS: Your Honor, on No. 1 I would like to state a phrase I omitted.

THE COURT: Yes.

MR. ARNESS: After the word "was" on the first line "Sinclair Refining Company was --" I would like to put there "under the circumstances of this case."

THE COURT: After the word "was".

MR. ARNESS: Yes.

THE COURT: In the second line?

MR. ARNESS: No; on the first line.

629 THE COURT: I see. "that the Sinclair Refining Company was--".

MR. ARNESS: Comma, "under the circumstances of this case, owes no duty to the plaintiff."

THE COURT: I will deny it, but cover it in part as I have indicated. Now we go to No. 2.

I will deny it, but will cover it in part, as I indicated.

No. 3. You object to that, don't you, Mr. Laskey?

MR. LASKEY: Yes, Your Honor.

THE COURT: I will deny it.

* * * * *

631 THE COURT: I will deny it, unless you want it, Mr. Laskey.

MR. LASKEY: No, I don't want it.

THE COURT: I don't think I would grant it if you wanted it.

I will deny No. 8, and cover it.

Now, No. 9: Do you object to 9?

MR. LASKEY: I object to it.

THE COURT: Denied. Now, I will take Mr. Welch's prayers.

MR. ARNESS: Your Honor, I did submit two additional prayers this morning.

THE COURT: Oh, yes, I have them here. No. 10, by Mr. Arness.

632 This goes back to your original proposition. You are saving your point again?

MR. ARNESS: Yes, Your Honor.

MR. LASKEY: I object

THE COURT: Denied. Now No. 11.

MR. LASKEY: Isn't that the same?

THE COURT: Same thing.

MR. LASKEY: I object.

THE COURT: Denied.

MR. ARNESS: Your Honor, before you leave me --

THE COURT: Do you have another one?

MR. ARNESS: No, but I have this matter I would like to make for the record:

Your Honor already considered defendant Toomeys' instruction No. 5 and 6. I think that they -- well, let me take up No. 5 first.

I would like to tender an instruction on behalf of the defendant Sinclair in the terms of the defendant Toomeys' instruction No. 2, except for a deletion of the last phrase "for the maintenance of the stairway without railings."

THE COURT: You want to submit that same prayer on behalf

633 of Sinclair, as to Toomeys' No. 5?

MR. ARNESS: Yes, except for the deletion of the last eight words which I thought were confusing as to use.

THE COURT: Leaving the last word as "herein"?

MR. ARNESS: Yes, Your Honor.

THE COURT: Do you object, Mr. Laskey?

MR. LASKEY: Yes, I do object.

THE COURT: Denied. What is the next one?

MR. ARNESS: I would like to offer defendant Toomeys' No. 6, on behalf of Sinclair, but Your Honor has already denied it.

THE COURT: All right.

MR. WELCH: Would you note also in connection with those, that defendant Muldrow makes a similar request to tender appropriately re-worded instructions 5 and 6 as to that?

THE COURT: Yes.

Now, let's get down to defendant Muldrow's prayers. You object, don't you, Mr. Laskey?

MR. LASKEY: Yes, Your Honor.

THE COURT: Denied.

* * * * *

OFFICIAL TRANSCRIPT OF CHARGE TO JURY

1

Washington, D. C.
Monday, December 3, 1962

The above-entitled cause came on for further trial before THE HONORABLE DAVID PINE, United States District Judge, and a jury, at 10:00 a.m.

* * * * *

2

THE COURT: Members of the jury, when a case is tried to a jury the court consists of two parts: the judge and the jury. Each has his separate duty and responsibility and function. It is the judge's duty at this stage of the trial to charge the jury, which means to give the jury the principles of law which are to guide and govern you in your disposition of this case. And that I shall now do. The jury has the function and

duty and responsibility of determining what the facts are. You are the fact-finding body. You are the sole judges of the facts. I am the sole judge of the law. Between us we constitute the court.

How do you find the facts? You find them from one source alone, namely, the evidence and inferences reasonably deducible from the evidence. The evidence consists of what you have heard from the lips of witnesses, and the exhibits which have been received in evidence, and nothing else. Where there have been stipulations by counsel, you may regard those stipulations as facts.

Being the sole judges of the facts you are of necessity the sole judges of the credibility of the witnesses. That is the amount of credence you will give to the testimony of each witness who has appeared before you. In determining credibility you will take into account the manner and demeanor and conduct of the witnesses as they testified;

3 whether they appeared to you to be truth-telling persons or otherwise; their ability or lack of ability to see and hear the things about which they testified; their ability or lack of ability to express to you through the medium of words what they have seen or heard; any interest in the outcome of the case which may have perverted or colored their testimony; any bias or prejudice which any witness may have shown which may have distorted his testimony; and all those other factors which you as reasonable people take into consideration when you determine whether a statement under oath is true or untrue, or true or partly true.

You will not let sympathy or prejudice or emotion of any kind enter into your thinking, into your deliberations, or into your verdict. Being fact-finders, you must approach your task and perform your task fairly, impartially, detachedly and objectively.

You are not permitted to guess or speculate, but you are permitted to bring into play your experiences in life and your common sense when you weigh and evaluate the testimony which you have heard in this case.

The burden of proof rests upon the party asserting the affirmative of a proposition. Therefore the plaintiff has the burden of proof in

establishing her case. Among the defenses is the defense of contributory negligence. That is an affirmative defense. Being an affirmative defense the burden rests upon the defendant to establish contributory negligence. That burden of proof is carried by a preponderance of the evidence.

4 Preponderance of the evidence does not mean the greater number of witnesses who have testified to one set of facts as against the number who testified to another set of facts. It is carried by that evidence which is the more convincing to your minds as jurors. Preponderance of the evidence is the greater weight of the evidence.

I shall use throughout this charge on occasions the term "proximate cause." The proximate cause of an injury is that cause which in natural and continuous sequence, unbroken by any efficient intervening cause, produces the injury, and without which the result would not have occurred. It is the efficient cause; the one that necessarily sets in operation the factors that accomplish the injury. It may operate directly or by putting intervening agencies in motion. This does not mean that the law seeks and recognizes only one proximate cause of an injury, consisting of only one factor, one act, one element or circumstance, or the conduct of only one person. To the contrary, several factors -- for example, the acts and omissions of two or more persons may work concurrently as the efficient causes of an injury, and in such a case each of the participating acts or omissions is regarded in law as proximate cause.

5 You should pay close attention to the summations of counsel. They are designed to assist you in marshaling and organizing the facts. But bear in mind that if your recollection differs from what counsel have said, it is your recollection that governs and not theirs, because what they say to you is not evidence. Also, in considering their summations, you should remember that each is an advocate of his particular side, and consider the summations in the light of that advocacy.

I shall comment on the evidence as I go along, not for the purpose of trespassing upon your function as fact-finders, but for the purpose

of assisting you in understanding the issues of law which I am giving you. And if anything I say to you is contrary to your recollection, it is your recollection that governs, not mine, because what I say to you is not evidence.

I have granted several prayers for instructions which state the law in respect to the matters dealt with. If there is any repetition in what I say to you generally and what is in the prayers, that repetition does not imply that I am emphasizing those points. It only means that some repetition is almost inevitable, if the Court's general charge is to be connected and understood and these prayers for instructions to which the parties are entitled are granted.

6 The fact that an accident occurred in this case does not in itself give rise to liability on the part of anyone. Before liability can attach to anyone for damages on account of an accident, there must be a finding that someone was negligent, and that such negligence proximately caused the accident.

What is negligence? You all know in a general way what it is, but let me define it for you again. Negligence is the failure to exercise reasonable care. Reasonable care is that degree of care which the law imposes on an ordinarily prudent person under the particular facts and circumstances involved. It is the doing of an act which an ordinarily prudent person would not do, or the failure or omission to do an act which an ordinarily prudent person would do. So when you come to determine whether the defendants, or any of them, were negligent, or whether the plaintiff was negligent in contributing to this accident, bear in mind that definition which I have just given you.

In this case there are three defendants, namely, the Toomeys, who are trustee owners of the property involved, and whom you will consider as one defendant; the Sinclair Refining Company, who leased the property from the Toomeys; and William T. Muldrow, who subleased the property from the Sinclair Refining Company. While there are three defendants

7 in this action, it does not follow that if one is liable the others are liable. Each is entitled to a consideration of his own defense separately,

but is not to be prejudiced by the fact, if it should become a fact, that you may find against another.

You will consider the case of the plaintiff against each defendant separately and render your verdict on the claim of the plaintiff against each defendant separately.

Generally stated, plaintiff claims that each and all of the defendants were negligent in maintaining an unlighted stairwell under circumstances reasonably requiring lighting, in maintaining an unguarded stairwell, in maintaining an uncovered stairwell, and in maintaining a stairwell without warning signs. Each of the defendants denies that he or it was negligent in any of these respects or otherwise; and in the alternative, which is permitted under our system of jurisprudence, claims that if he or it was negligent in any respect, he or it is absolved from liability by reason of the plaintiff's contributory negligence in failing to keep a proper observance of the conditions which existed and were to be seen and in not heeding where she walked. If established, this would relieve defendants from liability.

It is undisputed that the plaintiff, escorted by Mr. Lawrence, went to the Griffith Stadium on June 12, 1958 to witness a ball game; that previously, after dining at a restaurant on Connecticut Avenue,

8 they proceeded in Mr. Lawrence's automobile to the vicinity of Griffith Stadium, more particularly, to an alleyway extending southwardly from V Street; that Mr. Lawrence parked his car or caused it to be parked on a lot in no way connected with the gasoline station property here involved, at the instance of an unidentified person; that Mrs. Daly and Mr. Lawrence witnessed the ball game and on their way back to his automobile, after the game had ended, plaintiff fell into a stairwell leading down from the level of the alley into the premises involved and was injured. It also appears undisputed that at the time she fell she was on the property of the defendants, either as lessees or owners.

Technically, the plaintiff, when she entered upon the property of the defendants, was either a trespasser or a bare licensee. A trespasser

is a person who enters upon land of another without privilege or consent to do so. A bare licensee is one who is on property of another not by invitation but by mere acquiescence.

As regards the claim for negligence, both a trespasser and a bare licensee must take the premises as he finds them, and may recover only for intentional, wanton or wilful injury, or a hidden danger. None of these conditions existed in the present case, and defendants would be entitled to a verdict as a matter of law by direction of the

9 Court were it not for an exception to this general rule of law, which raises an issue of fact for your determination. This exception to the general rule of law is as follows: Where property is adjacent to a public highway, as is the case before you, and the occupant of the property maintains an excavation thereon, and also maintains a situation or condition where a reasonably prudent man might mistake the point where the highway ended and the private property began, the occupant of the property has a duty to take reasonable precautions to protect persons against falling into the excavation. In other words, if the occupant might reasonably have anticipated, as an ordinarily prudent person, that a reasonably prudent pedestrian, owing to the appearance of the place or the situation, might stray away from the highway in the belief that he was still on it and fall into the excavation, the occupant must take reasonable precautions to protect him against such a contingency.

I have used the word "occupant" in explaining this principle of law. But when this condition of the property has remained unchanged and was the same at the time of the accident as it was at the beginning of the term of the lease, and there is no dispute in this case from the evidence on this point, this principle of law, and the duty imposed thereunder, applies to the owner and intermediary lessor as well as to the

10 occupant or tenant, provided you find that the property comes within the description I have just given you, that is, stated briefly again: A condition or situation where a reasonably prudent pedestrian might mistake where the alley ended and the private property began and stray away from the alley into the stairwell, and that this condition,

so far as the Toomeys and the Sinclair Refining Company are concerned, remained unchanged during the term of the lease to Sinclair Refining Company, namely, September 1956 to the date of the fall of plaintiff into the stairwell.

However, if you should find that this condition comes within this description I have given you, and further find that reasonably adequate safeguards were provided by artificial lighting, and conclude that these safeguards were nullified by a failure to cause the lighting fixtures or some of them to be lighted on the occasion in question, defendants Tommey and Sinclair Refining Company would not be responsible, because the control of the lighting fixtures was in the hands of defendant Muldrow, who would be responsible for turning the lights on and off, and not under the control of the Toomeys and the Sinclair Company.

Plaintiff contends that she comes within this exception to the general law applicable to trespassers and bare licensees, and defendants contend that she does not on the ground that they did not maintain a situation or condition where a reasonably prudent person might mistake

11 the point where the alley ended and the defendants' property began and stray into the stairwell. Defendants further contend that even assuming that she does come within the exception, and that they did maintain a situation or condition where a reasonably prudent person might mistake the point where the alley ended and their property began, adequate safeguards were provided, by illumination in particular. The absence of rails down into the stairwell has nothing to do with this case, as their presence could in no way protect a person stepping into the stairwell from the side above the stairwell. Neither would the absence of a railing at the entrance to the stairwell have anything to do with this case.

You will recall that the evidence is in direct conflict as to the condition of the light at the place and the time where the plaintiff fell, as well as in numerous other respects. And it will be necessary for you to weigh the evidence and determine from the evidence what the facts are. There is no dispute, however, that there was no guard rail at the side above the stairwell, warning sign, cover or lights over the steps. But their absence

must be considered in connection with the total picture, including the sufficiency of the illumination from all sources, as you find it existed at the time, to determine whether there were or were not reasonable

12 precautions taken to protect an ordinarily prudent person from falling into the excavation under the circumstances of this case as you find them.

I shall now read certain of the prayers which I have granted the parties, and ask counsel if I don't read all that I have granted to inform me.

You are instructed that the plaintiff when walking upon public space or upon private property has an obligation to make reasonable observations as to conditions which confront her in order to protect herself. What observations she should have made and what she should have done for her own safety are matters which the law does not attempt to specify in detail, except that it does place upon her the continuing duty to exercise ordinary care to avoid an accident. The fact that the plaintiff who had a duty to look testifies that she did look but did not see that which was there to be seen is of no legal significance; for one who looks ineffectually is as careless as one who does not look at all, and such conduct on her part would constitute negligence.

In considering whether or not the plaintiff was contributorily negligent, you are instructed that in the exercise of ordinary care the reasonably prudent person is required to vary his conduct in direct proportion to the danger which he or she knows, or should know, is involved in the undertaking. The amount of caution required by the law increases with

13 the danger that reasonably should be apprehended.

You are instructed that the defendant, Sinclair Refining Company, as lessor of the filling station premises involved, is not responsible for any acts of negligence committed by the defendant, William T. Muldrow, in the active and everyday operation of the premises which he as an independent operator entered into under his lease with the Defendant, Sinclair Refining Company.

You are instructed that a plaintiff when walking upon public space

or upon private property has an obligation to exercise the full degree of care and caution which a reasonably prudent person would do under like circumstances to detect and observe any dangerous conditions which may exist in the path of his progress. What observation should have been made and what the plaintiff in this case should have done for her own safety are matters which the law does not attempt to regulate in detail, except that it does place upon the plaintiff the continuing duty to exercise that degree of care and caution which a reasonably prudent person would do under like circumstances to avoid injury. If you find from a fair preponderance of the evidence that the area where plaintiff sustained her fall was so lighted and illuminated that a reasonably prudent and cautious person could have and should have been able to detect and observe danger in the path of her progress, then it is of no legal significance that the plaintiff testified that she was looking ahead, as

14 she walked, but did not see the stairwell which was there to be seen.

Is that all of them, gentlemen?

MR. RYAN: Yes.

THE COURT: You will take up the claim of the plaintiff against each defendant separately, as I have told you, and the essential elements of the plaintiff's claim which you will apply to each defendant, except as I shall otherwise state, are follows:

- (1) That defendant maintained an excavation in the form of a stairwell.
- (2) That defendant maintained near and adjacent to the excavation a condition or situation from which a reasonably prudent person might mistake the boundary of the alley, that is, where the alley ended and the private property began, and might mistakenly stray away from the alley in the belief that he was still on it and fall into the stairwell; and that this condition existed during the term of the Sinclair lease until the date of the plaintiff's fall so far as the Toomeys and the Sinclair Refining Company are concerned.

- (3) That defendant failed to provide reasonable safeguards, such

as a railing at the side and above the stairwell, warning signs, a cover or illumination to protect any such person from falling into the stair-

15 well.

(4) That such failure constituted negligence and that such negligence proximately caused the plaintiff to fall into the stairwell and sustain injuries.

If you do not find that each and all of these essential elements have been established by a preponderance of the evidence in respect to one or more defendants, your verdict will be for such defendant or defendants.

If you do so find against one or more of the defendants, your verdict will be in favor of the plaintiff against such defendant or defendants, unless you find by a preponderance of the evidence that the plaintiff by her acts of conduct was negligent in some degree and that such negligence, irrespective of the degree, proximately contributed to causing her to fall and injure herself, in which case your verdict will be for the defendants.

If you find for the plaintiff against one or more defendants, you will then come to the question of damages and award the plaintiff such sum as will fairly and reasonably compensate her for the injuries sustained, taking into consideration the reasonable value and not to exceed the charge to plaintiff of the examinations, attention and care by her physician and surgeon, reasonably required and actually given in her treatment for these injuries, and the reasonable value not exceeding the charge to the plaintiff of the hospital accommodations and care reason-

16 ably required and actually given in her treatment; and such sum as will reasonably compensate her for her pain, discomfort and mental anguish suffered by her and such pain, discomfort and mental anguish and physical disability and disfigurement that you find under the evidence she is reasonably certain to suffer in the future, all as a proximate result of the injuries sustained in this accident. It is immaterial whether the charges for physicians and hospital costs have been paid and it is immaterial by whom they were paid.

As I have said, if you find in favor of the plaintiff against two or more of the defendants, your verdict will be in one lump sum as against each and all of the defendants whom you find liable. I do not know that I have said that or not, but I do say it now. Your verdict will be in one lump sum as against each and all of the defendants whom you find liable. This will not mean that the plaintiff will collect more than once. She is entitled to look to each defendant for the full amount of the damages.

When you go to your jury room you will first select your foreman who will preside over your deliberations. When you have reached your verdict, which must be unanimous, you will make that fact known to the marshal in whose custody you will be. He will inform me that you have reached a verdict. I shall assemble counsel and receive it. Your verdict will be announced by your foreman unless the jury is polled, in which case each of you will be required to announce it. You will be asked by the clerk when you come in to announce your verdict, first, if you have reached a verdict. When your foreman states that you have, the clerk will ask him, or each of you if the jury is polled, somewhat as follows:

In the claim of Virginia Warren Daly against James C. and John J. Toomey, do you find for the plaintiff or the defendant?

He will then ask you in the claim of Virginia Warren Daly against the Sinclair Refining Company, do you find for the plaintiff or the defendant.

He will next ask you in the claim of the plaintiff against William T. Muldrow, do you find for the plaintiff or the defendant.

If the answer is for the plaintiff in one or more of these claims, he will then ask you in what amount and you will state the single amount arrived at under these instructions.

Gentlemen, if there are objections, I will hear them at the bench.

(At the bench:)

THE COURT: I will hear the plaintiff's objections first.

MR. LASKEY: I renew the offer of the second paragraph as amended in number 6: That the fact, if you find it to be a fact,

that the stairwell was open to view in the sense that it might have been discovered by an extraordinarily prudent person is not material, for the test of due care is whether or not there was such a danger that a reasonably prudent person was likely not to discover under the circumstances existing at that time.

THE COURT: My ruling is the same. Anything further?

MR. LASKEY: No.

THE COURT: Now defendants Toomey.

MR. RYAN: I have no new requests, Your Honor. Simply restate the objections I made at the time of the Court's consideration of the prayers when tendered.

THE COURT: Very well.

MR. ARNESS: On behalf of the defendant Sinclair, Your Honor, I renew the objections previously made.

THE COURT: You mean you renew the prayers?

MR. ARNESS: I renew the objections and I also renew the prayers which were offered and which were rejected by the Court.

I have one further matter, Your Honor, of some concern. Under Your Honor's charge, if this jury should find that the condition described was maintained, they would have to find all of the defendants

19 liable except that if they should find it was due to the failure to light, they could find defendant Muldrow only.

Now, it is not clear, you have not stated, and under Your Honor's instructions the jury might feel that they could hold the defendant Sinclair without holding the defendant Muldrow. I do not think that that is possible under Your Honor's charge. I think any such verdict would be inconsistent, because if they find the condition the plaintiff maintained at the time of the accident they would have to hold Muldrow along with Sinclair. I don't think that was spelled out to the jury.

MR. LASKEY: Nothing further.

THE COURT: You want to object to my saying something further along that line?

MR. LASKEY: No. I think that is a correct analysis of the situation.

THE COURT: I thought it was clear.

MR. ARNESS: I became confused, Your Honor, when you said at first that each of the defendants is entitled to his own defense. Of course that is a correct statement of the law. Then you went on and said defendants each owed a duty in this respect and you spelled that out. Then you said that the defendant Muldrow could be held for failure to light the lights but the other two could not. But I don't think that

20 you made it clear that if they choose to hold any of the defendants for the maintenance of this condition, as it existed at the time of the lease, that they must hold all three of them.

MR. LASKEY: I change my position. I think it has been covered.

THE COURT: I guess you would object, wouldn't you?

MR. WELCH: No, sir, I wouldn't object, because I think it perhaps would stand a little elaboration, although I didn't feel that I was confused at all as to what you actually did say. But I won't object if you see fit to add something to it.

THE COURT: What is your position?

MR. RYAN: I concur now with Mr. Arness's position.

THE COURT: When I read those essential elements, I said were applicable to each, unless I stated otherwise. The first element was that the defendant maintained an excavation in the form of a stairwell. The second was that the defendant maintained near and adjacent to the excavation a condition or situation from which a reasonably prudent person might mistake the boundary of the alley, that is, where the alley ended and the private property began, and might mistakenly stray away from the alley in the belief that he was still on it and fall into the stairwell, and that this condition existed during the term of the Sinclair lease until the fall of the plaintiff, so far as the Toomeys and the Sin-

21 clair Refining Company are concerned.

Didn't I make the distinction there?

MR. ARNESS: Yes, on that particular point.

THE COURT: That is the reason I put that in.

MR. ARNESS: Well, Your Honor, I think that any verdict against

the defendants Toomey and Sinclair and in which the defendant Muldrow were not held would be an inconsistent verdict under Your Honor's charge.

THE COURT: I think it would.

MR. ARNESS: I wanted to avoid the risk of any inconsistent verdict. That is why I raised it to Your Honor.

THE COURT: I said also, and I made the distinction between the artificial lighting fixtures and whether it was lighted.

MR. ARNESS: Yes. According to my notes you specifically said Sinclair and Toomey were not responsible for turning the lights on.

THE COURT: That is right. Well, I think I will let it go. If they come out with an inconsistent verdict, I will take care of it.

Anything more you want?

MR. WELCH: Yes, sir.

22

THE COURT: I am afraid that will overemphasize the illumination.

MR. ARNESS: Your Honor can take care of it later.

MR. WELCH: I was of the distinct understanding, when we were discussing the instructions proffered, as to contributory negligence, that Your Honor intended to give a general contributory negligence charge.

THE COURT: I did.

MR. WELCH: I didn't hear it. I didn't hear it.

MR. LASKEY: Maybe I am supersensitive, but I heard it.

MR. WELCH: Just a minute, Mr. Laskey.

MR. LASKEY: I am sorry, Mr. Welch.

MR. WELCH: As it stands, your contributory negligence instruction tends to emphasize and confine contributory negligence to lack of lighting or to ability to see or what was there to be seen. There is nothing in the way of your charge of contributory negligence that gives us the benefit of the jury considering the fact that when she reached a point where it was too dark to see she continued ahead without attention

to where she was going. I don't ask you to set out or cite any particular testimony but I do ask for a general instruction on contributory negligence which would embrace my argument on that point.

MR. ARNESS: Your Honor, I join in that. I don't believe Your Honor did define contributory negligence.

23 MR. WELCH: No, you didn't.

THE COURT: Define it? I said in the very beginning what your contention was as to contributory negligence.

MR. WELCH: That is not defining it.

THE COURT: Wait a minute. Then I granted three prayers that you submitted on contributory negligence. I thought that was enough.

MR. WELCH: I don't think it is enough. If I hadn't understood that you were going to give a general charge on contributory negligence, I would have prepared another one to squarely meet her testimony that she got to the point where it was dark and she couldn't see and then she walked ahead. I think we are entitled to a little elaboration on it.

THE COURT: I said that was your contention. I said at one point, if established, this would relieve the defendants from liability.

MR. WELCH: If what is established?

THE COURT: You want to know what? I said they are absolved from liability by reason of plaintiff's contributory negligence in failing to keep a proper observance of the conditions which were existing and were to be seen and in not heeding where she walked.

MR. WELCH: I think that only highlights the situation on one phase of the contributory negligence here, and pretty much excludes or fails to embrace the fact that she walked where she couldn't see

24 after she knew that she couldn't see.

THE COURT: I had no idea you wanted that, and I think I have given enough. You gentlemen submitted some fifty prayers.

MR. ARNESS: Your Honor, referring to page 16, Instruction No. 31, that I don't think has been given in any form.

MR. WELCH: And that is the sort of general instruction I thought

Your Honor intended to give.

THE COURT: You mean the first sentence?

MR. ARNESS: Yes, Your Honor.

THE COURT: Any objection to giving the first sentence?

MR. LASKEY: First sentence of which one?

THE COURT: Of 31. I haven't said it.

MR. LASKEY: I think that has been covered and I would object to the added emphasis being given by an additional instruction.

THE COURT: Didn't I say somewhere, when I defined negligence, that that applied when they come to determine whether the defendants were guilty of negligence or the plaintiff of contributory negligence? That was the test they should apply? Didn't I say something like that?

25

MR. WELCH: Well, if you did, Judge, it didn't strike me as filling the void that I thought existed. Because this has occurred to me, that nowhere in these instructions did you do what I think is usually done. That is, say: If you find this negligence on the part of the defendant, and the absence of negligence or contributory negligence on the part of the plaintiff, you will find a verdict for the plaintiff.

THE COURT: I certainly did say that. Yes, I did. Yes, I did.

MR. ARNESS: The one thing that you did not do, and we have all argued it to the jury and now we are without the benefit of the Court's instruction: If you find that the plaintiff's negligence combines in some degree with that of the defendant. No place have you said that.

THE COURT: In defining "proximate cause" I said that.

MR. WELCH: Yes, but not as to contributory negligence.

THE COURT: You object, do you, Mr. Laskey?

MR. LASKEY: Yes, I do.

THE COURT: I think I will just give that and say you have called it to my attention.

MR. LASKEY: Will you also say if you had charged in substance that, you do not mean to unduly emphasize?

THE COURT: Yes.

MR. WELCH: Your Honor, so we won't come back, I preserve

26 the record as other counsel have done and say I renew the prayers and make the same objections in specifically discussing prayers.

THE COURT: Certainly.

(End of the bench conference.)

THE COURT: Members of the jury, counsel for the defendants have stated to me that they did not think that I had defined contributory negligence. I had the impression that I did. But in order to avoid having the reporter read back what I said and making certain about it, I am going to give you a definition of contributory negligence, but it is not for emphasis; it is just to make certain that it is in the charge. If I have already said it, the fact that I am saying it the second time does not intend to emphasize it. This is it:

Contributory negligence is negligence on the part of a person injured which combining in some degree with the negligence of another helps in proximately causing the injury of which he complains.

Now I will discharge the alternate jurors with expression of my appreciation for being so attentive and being able to substitute if necessary. You are discharged, Alternate Jurors.

The other jurors will take the case and commence their deliberations.

27 (Whereupon, at 3:37 p.m., the jury retired to the jury room.)

THE COURT: Recess until the return of the Court.

(At 6:04 p.m. the jury returned to the courtroom and the following occurred:)

THE COURT: Members of the jury, it is now shortly after six o'clock and you have been deliberating a little over two hours and a half. I don't want to unduly interfere with your plans for the evening and under those circumstances I am going to allow you to separate now and return tomorrow morning and resume your deliberations.

Remember my admonition to you not to discuss this case with anyone or allow anyone to discuss it with you. Don't discuss it amongst yourselves until all twelve of you are again in the jury room tomorrow morning and resume your deliberations. I know you will be tempted

when you go home to discuss the case with members of your family. If you do so you will be in contempt of Court. These parties are entitled to your judgment uninfluenced by any outside source whatever. So if there is anything in the newspapers about this case, or on the radio or television, I admonish you not to read anything about it or view anything about it. You are now excused until tomorrow morning at ten o'clock. Return promptly, resume your deliberations in the same jury room. Excused for the night.

(Thereupon, an adjournment was taken until the following morning, December 4, 1962, at 10:00 o'clock.)

TRANSCRIPT OF PROCEEDINGS
ON FURTHER INSTRUCTIONS TO THE JURY
AND VERDICT OF THE JURY

1

Washington, D. C.

Tuesday, December 4, 1962

The trial proceedings were resumed before the HONORABLE
DAVID A. PINE, United States District Judge, at 11:40 a.m.

* * * * *

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THE COURT: Gentlemen, I have this note from the jury reading as follows:

"Your Honor, the jury would appreciate pictures shown as exhibits in this case, together with hospital and physician's bills.

John C. Thornton."

I assume he is the foreman. Mr. Laskey?

MR. LASKEY: The plaintiff has no objection to the request, but in view of the fact that the evidence in this case as to the physician's bill consisted of the testimony of Doctor Peterson as to the value of his services up to the end of the point of treatment in the amount of \$445.00, and that there was no physical document as an exhibit, marked as an exhibit consisting of the doctor's bill, I would request that the jury

be told in response to their question that there was no doctor's bill offered in evidence but that there was testimony by the doctor as to the amount of his bill.

THE COURT: What is the position of the defense?

MR. RYAN: If your Honor please, I proffered a prayer or an instruction which your Honor denied which, in effect, requested that none of these bills be submitted to the jury. In the interest of expediency, and to be consistent, I will renew my objection at this point to that being

3 given; number one, physically the bill, and number two, certainly I object to them being told what the doctor testified the amount of his charges was. That is something they have to recollect.

THE COURT: He has not asked that. Do you object?

MR. RYAN: I object.

THE COURT: Do you object, Mr. Arness?

MR. ARNESS: Yes, your Honor, I object on the grounds that the jury's recollection with respect to what the oral testimony was, with respect to all aspects of the case, is something they are left to in their deliberation.

They have not asked for a recitation of any testimony, and I do not believe that it is proper at this stage to give them a recitation of any particular testimony. They have not heard --

THE COURT: Now, Mr. Arness, make your objection. You do not have to talk a half-hour on an objection to a thing like that.

MR. ARNESS: Very well, your Honor.

THE COURT: Is there anything more?

MR. ARNESS: No, your Honor.

THE COURT: Do you object, Mr. Welch?

MR. JAMES WELCH: I merely concur in what Mr. Arness has said.

4 THE COURT: Then you object?

MR. JAMES WELCH: Yes, I object.

THE COURT: Very well. The objections are overruled. Bring the jury in.

(Whereupon, the members of the jury panel entered the

courtroom and stood in front of the jury box.)

THE COURT: Members of the jury, I have received this note, reading as follows:

"Your Honor, the jury would appreciate pictures shown as exhibits in this case, together with hospital and physician's bill.

John C. Thornton."

I assume he is the foreman.

THE JURY FOREMAN: Yes, your Honor.

THE COURT: The clerk will hand you the photographs which are received in evidence as exhibits.

He will also hand you the hospital bill.

There was no physician's bill in this case. Doctor Peterson testified what his fair and reasonable charges were, and the charges that he had made.

Will you hand those photographs to the jury, please, Mr. Clerk.

5

THE DEPUTY CLERK: Yes, your Honor.

THE COURT: You may proceed to resume your deliberations.

(Whereupon, at 11:44 o'clock a.m. the members of the jury panel returned to the jury room to deliberate further of their verdict.)

(At 4:49 o'clock p.m., the members of the jury panel were recalled to the courtroom where the following proceedings took place:)

FURTHER INSTRUCTIONS TO THE JURY

THE COURT: Members of the jury, it is now eleven minutes to 5:00, and as I compute the time you have been deliberating a little more than eight hours.

Not having heard from you, I assume you have not agreed upon a verdict.

At this stage of the case, however, I think I should give you one additional instruction, and it is as follows:

The jury are instructed that in a large proportion of cases absolute certainty cannot be expected. Although the verdict must be the

verdict of each individual juror and not a mere acquiescence in the conclusion of his fellows, yet the jury should examine the question submitted with candor and with a proper regard and deference for the

6 opinions of each other. It is their duty to decide the case if they can conscientiously do so. They should listen, with a disposition to be convinced, to each other's arguments. If much the larger number are for the plaintiff, a dissenting juror should consider whether his views, which make no impression upon the minds of so many persons equally honest, equally intelligent with himself, are correct. If, upon the other hand, the majority are for the defendant, the minority ought to ask themselves whether their views are correct, which are not concurred in by the majority.

You will now retire to your jury room and resume your deliberations.

(Whereupon, the members of the jury panel, having received a further instruction from the Court, retired to the jury room to deliberate further of their verdict.)

THE COURT: Now, gentlemen, you can make your objections to the giving of the Allen Charge.

MR. RYAN: On behalf of the defendants Toomey, if your Honor please, I do so object.

MR. ARNESS: I likewise object, your Honor.

MR. H. MASON WELCH: Because of the circumstances as they exist at this time, I likewise object.

MR. LASKEY: No objection, your Honor.

7 THE COURT: The objections are duly noted.

MR. RYAN: I assume that the record at this point, if your Honor please, does not indicate that any requests have come from the jurors for further instructions, nor has the Court received any notice that they are in apparent conflict, and did this in the interest of time and expediency, as you announced it now being a little before 5:00 o'clock.

THE COURT: Mr. Ryan, if any such word had come to me, you would have been advised and you know it.

MR. RYAN: I know that, your Honor, but there is nothing on the record to so indicate.

THE COURT: The record does not need that.

MR. RYAN: That is correct, your Honor.

THE COURT: We will now recess until the return of the Court.

(Whereupon, at 5:10 o'clock p.m. the members of the jury panel returned to the courtroom with their verdict as follows:)

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE JURY FOREMAN: We have.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendants James C. Toomey and John J. Toomey, do you find for the plaintiff or the defendants?

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THE JURY FOREMAN: Defendants.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendants Sinclair Refining Company, do you find for the plaintiff or the defendant?

THE JURY FOREMAN: Plaintiff.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendant William T. Muldrow, do you find for the plaintiff or for the defendant?

THE JURY FOREMAN: Defendant.

THE COURT: Members of the jury, you apparently have misunderstood one of my instructions. When you find against the Sinclair Refining Company -- and did you say for or against Muldrow?

THE JURY FOREMAN: For Muldrow.

THE COURT: I will ask you to retire to the jury room while I discuss this question with counsel, and I withdraw what I have just started to say to you and I will instruct you further.

(Whereupon, at 5:12 o'clock p.m. the members of the jury panel retired from the courtroom as directed by the Court.)

THE COURT: Now, gentlemen, I do not see that they can be consistent and find against the Sinclair Refining Company and for Muldrow

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and for the Toomeys.

MR. ARNESS: I am sure that they cannot, your Honor.

MR. RYAN: If your Honor please, I submit there is one little bit of testimony on which I think they could.

MR. ARNESS: I must object to this.

MR. RYAN: Wait!

If your Honor will recall on this, Mr. John Toomey testified that they leased this place consistently from their family to the Sinclairs, and that somewhere between 1949 and 1956, which was a lease to Sinclair even ahead of this one, there had been a light in the back of the premises when they leased to Sinclair, insofar as this back stairwell was concerned.

So the jury could have been finding that the later removal of that one light over the ascending stairway, which disappeared sometime between the time of the leasing from the Toomeys to the Sinclairs, was one of the factors that had to be taken into consideration to arrive at the Toomey liability posture which they have now discounted.

THE COURT: Do you wish to be heard, Mr. Arness?

MR. ARNESS: Yes, your Honor.

With respect to that, the testimony was that that was knocked off at some time, and your Honor asked the question whether he knew if it was prior to his lease, and he said he did not know whether it was or not, and your Honor accepted that answer; and that is the only testimony

10

in the record.

MR. H. MASON WELCH: I wish to be heard so far as Muldrow is concerned, very briefly:

I do not see any inconsistency. They could have found against Sinclair on the basis of having participated in and been partly responsible for the presence and existence of that so-called dangerous condition, and they could have felt definitely that Muldrow had lighted the lights and that he had done everything that a reasonably prudent person would do under the circumstances in the maintenance and operating of those premises.

THE COURT: Do you wish to be heard, Mr. Laskey?

MR. LASKEY: Yes, your Honor.

I think that the verdict against the Sinclair Refining Company is supported by the evidence, and under the instructions of the Court. In addition to the light, to which reference has been had, there has been evidence that following the original leasing by the Sinclair Refining Company, they undertook to inspect and make certain recommendations with regard to the improvements of this station, and in so doing they accepted the responsibility. I think the verdict against them would be sustained.

THE COURT: I think it is inconsistent with my instructions. I will have to instruct them further and ask them to resume their deliberations.

11

MR. WELCH: I think we ought to have some intimation, some idea of what your Honor has in mind about further instructions. I think any further instructions now, no matter what it is, would be coercion. I think this jury should be discharged unless your Honor is willing to accept the verdict. Anything you do now is going to coerce them.

THE COURT: I disagree with you. Bring the jury in.

(Whereupon, at 5:17 o'clock p.m., the members of the jury panel entered the courtroom, took their seats in the jury box, and were instructed further by the Court as follows:)

FURTHER INSTRUCTIONS TO THE JURY

THE COURT: Mr. Foreman and members of the jury, I will commence where I started to commence a few moments ago:

You apparently misunderstood one of my instructions on the law, when you find against the Sinclair Refining Company and for the Toomeys and for Muldrow. You will remember that I told you the exception to the general rule in respect to trespassers and bare licensees applied to the occupant or tenant who is defendant Muldrow, and also to the intermediate lessor and the owner, the Sinclair Refining Company and the Toomeys, if the condition justifying an application of the exception to the general

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rule existed during the term of the lease to the date of the

accident. But that if you should find the condition came within the exception, and reasonably adequate safeguards were provided by artificial lighting, and that these safeguards were nullified by a failure to cause the lighting fixtures, or some of them, to be lighted on the occasion in question, the Toomeys and the Sinclair Refining Company would not be responsible because the control of the lighting fixtures was in the hands of Muldrow who would be responsible for turning the lights on and off, and not under the control of the Toomeys and the Sinclair Refining Company.

Therefore, if your verdict is against either the Sinclair Refining Company or the Toomeys, it necessarily must be against all three of them because the only possible way it could be against Muldrow and in favor of the Toomeys and the Sinclair Refining Company would be if you should find that there were artificial lighting facilities which were nullified by a failure to cause the lighting facilities, or some of them, to be lighted.

Therefore, if your verdict is based on the exception to the general rule, which I have given you, then your verdict should be against all three; but if your verdict is only against the one who failed to turn on the lighting fixtures, if one did fail to turn them on, then in that case only could it be against Muldrow individually.

13 Now, with that explanation, I suggest that you return to your jury room and resume your deliberations.

Now, if you have something to say, Mr. Welch, it had better be said out of the presence of the jury, don't you think?

MR. WELCH: That is satisfactory to me, but I do have something to say.

THE COURT: Of course. I assume you do. The jury will retire.

(Whereupon, at 5:20 o'clock p.m. the members of the jury panel, having received instructions, retired to the jury room to further deliberate their verdict.)

MR. WELCH: On the record, if the Court please, it appears to me that this jury was probably in conflict and could not have been reconciled

without the Allen Charge.

After the Allen Charge it is apparent that the jury has readily adjusted some difference that they had, and returned a verdict.

The jury has returned a verdict. If that verdict is erroneous as a matter of law, there is only one way to treat it: accept the verdict, discharge the jury, and then follow the legal procedures with respect to the rights of the respective parties.

14 I submit the Court has no right to hear the verdict of the jury from the jury foreman and then undertake to send the jury back to try to arrive at a different verdict by giving them partial instructions which in themselves prejudice the rights of the defendants in this case.

I respectfully submit this jury should be discharged. If there is error in the verdict, it should be corrected as a matter of law at the proper time, and this Court should not undertake to make this jury reach some other verdict.

MR. RYAN: On behalf of the defendants Toomey, if your Honor please, I concur in the position expressed by Mr. Welch to your Honor.

MR. ARNESS: Your Honor, I believe that the verdict, as rendered, could not have been rendered under your Honor's charge, and the jury, in rendering that verdict, clearly did not follow the law as your Honor expressed it. There were only two alternatives, either to send them back for further deliberations, as your Honor has done, or to declare a mistrial and begin the proceedings again. I certainly think it is not a matter of letting this inconsistent verdict stand and then try to cure it up some other way in some other manner.

15 MR. LASKEY: I would stand on the position that whatever the Court decides in the exercise of its discretion to do at the remainder of the verdict, we are entitled to have the verdict as to Sinclair as announced.

THE COURT: I do not see how you can "have your cake and eat it too."

MR. LASKEY: I am trying to figure out some way, your Honor.

THE COURT: You haven't done it yet.

(Whereupon, at 5:25 o'clock p.m., a recess was taken until the return of the Court.)

(At 6:12 o'clock p.m., the members of the jury panel returned to the courtroom and took their seats in the jury box.)

THE COURT: Mr. Foreman and members of the jury, I have requested the United States Marshal to take you to dinner. The bus will be here in about five minutes.

During the dinner hour do not discuss the case. Wait until you are back in your jury room before you continue your deliberations.

The Court will now stand recessed until the return of the Court.

(Whereupon, a recess was taken until the return of the Court. At 11:05 o'clock p.m., the members of the jury panel returned to the courtroom where the following proceedings occurred:)

16 THE COURT: Mr. Foreman, you and the other members of the jury have had this case now since yesterday afternoon about 3:30, and you have been deliberating as I compute it something over twelve hours. I have heard nothing from you and I assume you have not reached a verdict.

THE JURY FOREMAN: No, your Honor, we have not.

THE COURT: If given more time, do you think that you could reach a unanimous verdict?

THE JURY FOREMAN: I think so, your Honor.

THE COURT: If given more time?

THE JURY FOREMAN: If given a little more time, I think we would be able to reach a verdict; yes, sir.

THE COURT: I do not want it to appear to be coercive to keep you here, but under those circumstances -- it is now 11:00 o'clock, or shortly after 11:00 -- I will let you go home and get a good night's rest, come back here refreshed, and resume your deliberations at 10:00 o'clock tomorrow morning.

Bear in mind my admonition not to discuss this case with anyone or allow anyone to discuss it with you, and not to discuss it amongst

yourselves until you reassemble in your jury room, and listen to nothing about it on your radio, or over television, and read nothing about it in the newspapers.

Very well, you are excused now until 10:00 o'clock tomorrow morning.

17

Report back promptly at 10:00 o'clock to resume your deliberations.

(Whereupon, at 11:07 o'clock p.m., the Court was adjourned until tomorrow, Wednesday, December 5, 1962, at 10:00 o'clock a.m.)

Washington, D. C.

Wednesday, December 5, 1962

The proceedings in the above-entitled cause were resumed at 12:30 o'clock p.m., before HONORABLE DAVID A. PINE, United States District Judge, for the verdict.

* * * * *

19 THE COURT: Gentlemen, in the Daly case, will you please come forward. I understand the jury has reached a verdict.

(Counsel for all parties took their places at the trial tables.)

THE COURT: Bring the jury in.

(Whereupon, at 12:30 o'clock p.m., the members of the jury panel entered the courtroom and rendered their verdict as follows:)

VERDICT OF THE JURY

THE DEPUTY CLERK: Mr. Foreman, has the jury agreed upon a verdict?

THE JURY FOREMAN: We have.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendants James C. Toomey and John J. Toomey, do you find for the plaintiff or the defendants?

THE JURY FOREMAN: The plaintiff.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendant Sinclair Refining Company, do you find for the plaintiff or the defendant?

THE JURY FOREMAN: Plaintiff.

THE DEPUTY CLERK: In the claim of Virginia Warren Daly against the defendant William T. Muldrow, do you find for the plaintiff or the defendant?

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THE JURY FOREMAN: Plaintiff.

THE COURT: For what?

THE JURY FOREMAN: The plaintiff.

THE DEPUTY CLERK: In what amount, Mr. Foreman?

THE JURY FOREMAN: Seventeen thousand dollars.

THE DEPUTY CLERK: Members of the jury, your foreman says that you find for the plaintiff against all of the defendants in the amount of \$17,000.00 and that is your verdict so say you each and all?

MR. RYAN: If your Honor please, I have two requests to make at this time. I ask if your Honor would inquire of the jury whether or not any of the members of the panel saw or observed the article which appeared in this morning's Post on the first page.

THE COURT: I admonished them not to read anything.

MR. RYAN: I know, your Honor did, but it was a very obvious, open paper and it is quite possible that through mistake some of them did, and I would ask your Honor if you would make that inquiry.

My second request is to poll the jury.

THE COURT: Yes.

Did any of you read the article in the morning Post?

(The jurors responded by nods negative.)

They all nodded their heads they did not.

21 MR. RYAN: My next request is that the jury be polled, if your Honor please.

THE COURT: If you wish the jury polled, do you wish it polled as to the other defendants or not?

MR. ARNESS: Yes, your Honor.

MR. WELCH: Yes.

THE COURT: Very well.

POLLING OF THE JURY

THE DEPUTY CLERK: Members of the jury, as your names are called will you please state your individual verdict.

Miss Clara E. Aaron, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MISS AARON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Sinclair Refining Company?

MISS AARON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Muldrow?

MISS AARON: Plaintiff.

THE DEPUTY CLERK: In what amount?

MISS AARON: Seventeen-thousand.

THE DEPUTY CLERK: Miss Mary I. Feigert, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MISS FEIGERT: Plaintiff.

22 THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Sinclair Refining Company?

MISS FEIGERT: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Muldrow?

MISS FEIGERT: Plaintiff.

THE DEPUTY CLERK: In what amount?

MISS FEIGERT: Seventeen-thousand.

THE COURT: I did not hear her.

MISS FEIGERT: Seventeen-thousand.

THE DEPUTY CLERK: Keep your voice up, please.

James E. Taylor III, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MR. TAYLOR: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MR. TAYLOR: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Muldrow?

MR. TAYLOR: The plaintiff.

THE DEPUTY CLERK: In what amount?

MR. TAYLOR: Seventeen thousand dollars.

THE DEPUTY CLERK: Mrs. Deborah Mason, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

23 MRS. MASON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Sinclair Refining Company?

MRS. MASON: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Muldrow?

MRS. MASON: The plaintiff.

THE DEPUTY CLERK: In what amount?

MRS. MASON: Seventeen thousand dollars.

THE DEPUTY CLERK: Miss Thelma B. Jones, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MISS JONES: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MISS JONES: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Muldrow?

MISS JONES: Plaintiff.

THE DEPUTY CLERK: In what amount?

MISS JONES: Seventeen-thousand.

THE DEPUTY CLERK: Mrs. Mamie C. Moody, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MRS. MOODY: Plaintiff.

24 THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Sinclair Refining Company?

MRS. MODDY: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MRS. MOODY: The plaintiff.

THE DEPUTY CLERK: In what amount?

MRS. MOODY: Seventeen thousand dollars.

THE DEPUTY CLERK: Waverly P. Baird, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MR. BAIRD: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MR. BAIRD: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MR. BAIRD: The plaintiff.

THE DEPUTY CLERK: In what amount?

MR. BAIRD: Seventeen thousand dollars.

THE DEPUTY CLERK: Mrs. Ometta F. Kearney, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MR. KEARNEY: Plaintiff.

25 THE DEPUTY CLERK: Do you find for the plaintiff or the defendant Sinclair Refining Company?

MRS. KEARNEY: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MRS. KEARNEY: The plaintiff.

THE DEPUTY CLERK: In what amount?

MRS. KEARNEY: Seventeen thousand dollars.

THE DEPUTY CLERK: Miss Gloria G. Aiello, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MISS AIELLO: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MISS AIELLO: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MISS AIELLO: Plaintiff.

THE DEPUTY CLERK: In what amount?

MISS AIELLO: Seventeen thousand dollars.

THE DEPUTY CLERK: Robert N. Starke, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MR. STARKE: The plaintiff.

26 THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MR. STARKE: The plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MR. STARKE: The plaintiff.

THE DEPUTY CLERK: In what amount?

MR. STARKE: Seventeen thousand dollars.

THE DEPUTY CLERK: Miss Ray Wolfson, do you find for the plaintiff or the defendants James C. Toomey or John J. Toomey?

MISS WOLFSON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MISS WOLFSON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MISS WOLFSON: Plaintiff.

THE DEPUTY CLERK: In what amount?

MISS WOLFSON: Seventeen thousand dollars.

THE DEPUTY CLERK: John C. Thornton, do you find for the plaintiff or the defendants James C. Toomey and John J. Toomey?

MR. THORNTON: Plaintiff.

27 THE DEPUTY CLERK: Do you find for the plaintiff or the defendant the Sinclair Refining Company?

MR. THORNTON: Plaintiff.

THE DEPUTY CLERK: Do you find for the plaintiff or the defendant William T. Muldrow?

MR. THORNTON: Plaintiff.

THE DEPUTY CLERK: In what amount?

MR. THORNTON: Seventeen-thousand.

THE DEPUTY CLERK: The jury has been polled, your Honor.

THE COURT: Members of the jury, your tour of service as jurors has expired and you are excused finally.

Although I have no authority to direct you to do this, I would suggest to you, as a wise thing to do, and the part of wisdom, not to discuss with anyone what took place in your jury room during your deliberations. That is a matter entirely for you.

The Court will now stand recessed until 1:45.

(TRIAL CONCLUDED)

[Filed December 5, 1962]

**DEFENDANT SINCLAIR REFINING COMPANY'S
REQUESTED INSTRUCTION NO. 7**

You are instructed that the defendant, Sinclair Refining Company, had no duty to the plaintiff in this case except with reference to conditions which existed on the premises at the time of its lease to defendant, William T. Muldrow, and which were known to it and which were not readily known to defendant, William T. Muldrow, and which it could not reasonably have expected defendant, William T. Muldrow, to have remedied or to have guarded against.

Denied

/s/ Pine, J.

Bowles v. Mahoney, 91 U.S. App. D.C. 155, 202 F. 2d 320, Cert. denied 344 U.S. 935.

[Filed December 5, 1962]

**DEFENDANT SINCLAIR REFINING COMPANY'S
REQUESTED INSTRUCTION NO. 9**

You are instructed that the defendant, Sinclair Refining Company, as lessor of the filling station premises involved, is not responsible for any structural defects on the premises because it did not own them and because under its lease with defendants James C. Toomey and John Toomey, Trustees, it was not permitted to make any structural changes in the premises without the consent of the owners. Under the law Sinclair Refining Company took the premises in the condition they existed at the time the lease was entered into with defendants Toomey and was responsible for the maintenance of the premises in the same condition in which they were at the time of the lease only while it was in active possession and control.

Denied

/s/ Pine, J.

Bowles v. Mahoney

Exhibit No. 7 lease from defendant Sinclair.

[Filed December 5, 1962]

**DEFENDANT SINCLAIR REFINING COMPANY'S
REQUESTED INSTRUCTION NO. 10**

You are instructed as a matter of law that defendant, Sinclair Refining Company, as a lessee of the gas station premises, was not required to change or correct a structural defect and dangerous condition which was created and existed before it took possession. Therefore, if you find that the plaintiff was injured because the stairway into which she fell was negligently constructed and located and was in fact a nuisance and dangerous condition, but you also find that it was created by the owners of the premises and existed before Sinclair Refining Company leased the premises, then your verdict shall be in favor of said defendant.

Denied

/s/ Pine, J.

[Filed December 5, 1962]

**DEFENDANT SINCLAIR REFINING COMPANY'S
REQUESTED INSTRUCTION NO. 11**

You are instructed that the defendant, Sinclair Refining Company, as a lessee of the filling station premises involved, is not responsible for any structural defects on the premises because it did not own them, and, because under its lease with defendants Toomey it was not permitted to make any structural changes or improvements at the station without the consent of the owners Toomey. Under the law, Sinclair Refining Company took the premises in the condition that they existed at the time

its lease was entered into with the owners Toomey and it was responsible for the maintenance of the premises only in the same condition in which they were at the time it took possession and control. Therefore, if you find from a fair preponderance of the evidence that the existence of the stairwell was in fact a nuisance and dangerous condition because of the manner of its construction and location and you further find that said condition existed prior to the lease between the owners Toomey and defendant Sinclair Refining Company and you further find that plaintiff's alleged injuries were directly and proximately caused by reason of the existence of said nuisance and dangerous condition, then your verdict must be in favor of the defendant, Sinclair Refining Company.

Denied

/s/ Pine, J.

[Filed December 5, 1962]

VERDICT AND JUDGMENT

This cause having come on for hearing on the 26th day of November, 1962, before the Court and a jury of good and lawful persons of this district, to wit:

* * * * *

who, after having been duly sworn to well and truly try the issues between Virginia Warren Daly, plaintiff and James C. Toomey, John J. Toomey, Trustees u/w Ellen C. Toomey, deceased, Sinclair Refining Company, a corporation, and William T. Muldrow, t/a Muldrow's Auto Service, defendants and after this cause is heard and given to the jury in charge, they upon their oath say this 5th day of December, 1962, that they find the issues aforesaid in favor of the plaintiff and that the money payable to her by the defendants by reason of the premises is the sum of Seventeen-Thousand-Dollars (\$17,000.00).

WHEREFORE, it is adjudged that said plaintiff recover of the said defendants the sum of Seventeen-Thousand-Dollars (\$17,000.00) together with costs.

HARRY M. HULL, Clerk,

By /s/ Dean F. Miller
Deputy Clerk

By direction of
Judge DAVID A. PINE

[Filed December 14, 1962]

**MOTION TO SET ASIDE VERDICTS AND JUDGMENTS
AND TO ENTER JUDGMENTS IN FAVOR OF DE-
FENDANTS IN ACCORDANCE WITH THEIR MOTIONS
FOR DIRECTED VERDICTS PURSUANT TO RULE 50(b),
FEDERAL RULES OF CIVIL PROCEDURE, OR IN THE
ALTERNATIVE FOR A NEW TRIAL.**

Now come the defendants James C. Toomey and John J. Toomey, Trustees, Sinclair Refining Company, and William T. Muldrow, by their respective counsel, and move the Court to set aside verdicts and judgments and to enter judgments in favor of defendants in accordance with their motions for directed verdicts pursuant to Rule 50 (b), Federal Rules of Civil Procedure, or in the alternative, for a new trial, and as reasons therefor state:

- (1) The Court erred in refusing to grant the motions of defendants for directed verdicts at the close of plaintiff's case.
- (2) The verdicts of the jury are contrary to law.
- (3) The verdicts of the jury are contrary to the evidence.
- (4) The verdicts of the jury are contrary to the weight of the evidence.
- (5) The Court erred in rejecting evidence bearing on the responsibility of the various defendants to make improvements.
- (6) The verdicts of the jury are the result of unwarranted interjection of the Court into the deliberations of the jury at a time when said jury had shown no signs of any disagreement and influence of the

Court upon the jury deliberations.

(a) Without request from the jury or it appearing that circumstances justified such action the Court recalled the jury from its deliberations and, only because the jury had failed, at that time, to arrive at verdicts, instructed the jury with the "Allen Charge." Under the existing circumstances this action by the Court was in the nature of compelling or directing the jury to reach verdicts.

(b) The Court's refusal to accept and record the verdicts of the jury which were returned within fifteen minutes after the "Allen Charge."

(c) The Court erroneously declared said verdicts of the jury were not acceptable to the Court as being contrary to the Court's instructions to the jury on the law.

(d) The Court erred in reinstating the jury and requiring further deliberation.

(e) The Court erred by reinstating the jury in such a manner as to require, or compel, or suggest verdicts in favor of plaintiff against all defendants.

(f) The Court erred inasmuch as the jury had definitely returned verdicts in favor of defendants James C. Toomey and John J. Toomey, Trustees, and William T. Muldrow.

(7) The Court erred in failing to find plaintiff guilty of contributory negligence as a matter of law and directing verdicts in favor of all defendants.

(8) The pattern of the jury's deliberations in this case and the precipitate verdicts following the "Allen Charge"; the fact that the jury in its first verdicts completely absolved the defendants James C. Toomey and John J. Toomey, Trustees, and William T. Muldrow of any negligence and found in favor of said defendants; the improvident reinstruction to the jury and the fact that the jury after further prolonged deliberation returned verdicts completely reversing its decision in favor of said defendants James C. Toomey and John J. Toomey, Trustees, and William

T. Muldrow; and the excessive amount of the verdicts clearly indicate that the final verdicts of the jury were the result of undue sympathy for the plaintiff and unwarranted coercion and pressures by the Court.

(9) The amount of the verdicts in favor of plaintiff is contrary to the evidence and is unconscionably excessive.

And for such further and other reasons as may appear from the record herein and as may be urged upon argument hereupon.

WHEREFORE, in consideration of this motion and the memorandum of points and authorities attached hereto and by reference made a part hereof, this Court is respectfully requested to set aside the verdicts and judgments previously entered and to enter judgments in favor of the defendants in accordance with their respective motions for directed verdicts, or in the alternative, to grant a new trial.

/s/ Harry L. Ryan, Jr.
Attorney for Defendants Toomey

HOGAN & HARTSON

By /s/ John P. Arness
Attorneys for Defendant Sinclair

WELCH, DAILY & WELCH

By /s/ H. Mason Welch
Attorneys for Defendant Muldrow

[Certificate of Service]

[Filed January 10, 1963]

OPINION

Defendants, hereinafter referred to as the Toomeys, Sinclair and Muldrow, have filed a joint motion to enter judgments in their favor under Rule 50 (b) Fed. R. Civ. P., or in the alternative for a new trial.

Their Memorandum of Points and Authorities attached thereto does not discuss two contentions vigorously asserted at the trial. However, their motion does state that the Court erred "in refusing to grant the motions of defendants for directed verdicts at the close of plaintiff's case," and that "the verdicts of the jury are contrary to law." This

general language is sufficiently sweeping to cover the contentions which were urged at the trial, but which oddly are omitted from their present Memorandum. I cannot assume that they have been abandoned in view of this general language, and therefore shall state my position in respect of them.

Before the incident giving rise to this suit, plaintiff and her escort had attended a night baseball game. At the conclusion of the game they left the stadium where it was held, and proceeded toward a lot where plaintiff's escort had parked his automobile. Their route took them along a city street until they reached a public alley. At this point they turned from the sidewalk of this street into the alley. Automobiles were being driven out of the alley from parking lots adjacent thereto. Pedestrians were walking into and in the alley in the direction of these lots. To avoid oncoming automobiles, plaintiff and her escort walked to their left in single file with plaintiff in the lead. They walked a short distance in the same direction when plaintiff, according to her testimony, again stepped to her left to avoid an automobile parked in their path. Thereafter, she took several steps forward, fell into a stairwell from the side thereof and was injured. The stairwell led from the alley to the basement of a building. The basement was used for storage purposes and above it was a building used in part as the office portion of a gasoline station selling Sinclair products. This station, including the open and enclosed portion thereof, traversed the alley from the sidewalk of the street where plaintiff had turned into the alley to a point beyond where she fell. The gasoline station property and the alley were immediately adjacent to each other. The side of the building did not extend to the alley but was several feet back of it, thereby giving room for the stairwell. It was not covered, had no warning signs on it, and no guard rail above and at its side. There was evidence that there were two flood lights on a building across the alley, and evidence that it was dark, or very dark, where she fell. If the latter be the fact, no flood lights existed, or if they did, they were inadequate, or were unlighted. There was a raised coping extending several inches above the level of the ground at the side of the stairwell,

but this was broken away in part. The stairwell had existed in the same condition for many years and long prior to the leaseholds hereinafter referred to. There was no line or sign marking the boundary between the alley and the gasoline station property, and at the time plaintiff fell she was on the property of defendants. Technically, therefore, she was a trespasser or a bare licensee, who, as a general rule, is required to take the premises as he finds them, and, if injured, can recover only for intentional, wanton or willful injury or a hidden danger.^{1/} None of these conditions existed, and it was urged at the trial that defendants were entitled to a directed verdict as a matter of law on this account.

But this rule of law on which reliance was placed, is a general rule, and subject to an exception, namely, that where property is adjacent to a public highway, and the occupant of the property maintains a dangerous condition, such as an excavation thereon, and also maintains a situation or condition where a reasonably prudent person might mistake the point where the highway ends and the private property begins, the occupant has a duty to take reasonable precautions to protect persons against falling into the excavation. In other words, if the occupant might reasonably have anticipated that a reasonably prudent pedestrian, owing to the appearance of the place, might stray away from the highway in the belief that he was still on it, and fall into the excavation, the occupant must take reasonable precautions to protect him against such a contingency.^{2/}

1/ *Firfer v. United States*, 93 U.S. App. D.C. 216
Smith v. Kelly, 107 U.S. App. D.C. 140

2/ *Concho Const. Co. v. Oklahoma Natural Gas Co.*, 201 F. (2d) 673
 (10th Cir.)

Louisville & N. R. Co. v. Anderson, 39 F. (2d) 403, 405

Crogan v. Schiele, 53 Conn. 186; 1 A. 899

Tomle v. Hampton, 129 Ill. 379; 21 N. E. 800

Rachmel v. Clark, 205 Pa. 314; 54 A. 1027

Bryan v. Hines, 245 App. Div. N.Y. 322; 281 N. Y. Supp. 420

Beck v. Carter, 68 N. Y. 283 (1877)

Restatement of the Law of Torts, 1934, sec. 367

Prosser on Torts (2d Ed.) 428 et seq.

There was evidence sufficient to support a verdict on this basis, which was relied on by plaintiff, and a motion for a judgment n.o.v. accordingly is not well taken in this respect.

The defendants, however, claimed at the trial that a directed verdict should have been granted on another ground. This was based on their legal status and contractual relations, which I shall now discuss.

The owners of the property in question were the defendants Toomey. They were trustees of the estate of Ellen C. Toomey, who acquired the property at the turn of the century, and title had been vested in her and her trustees continuously since then. In the early thirties, the owners remodeled the property, the original building of which had been used as a Civil War prison, and converted it into a gasoline station, with the usual appurtenances of pumps, etc., and remodeled the old building into an office for the gasoline station and for other purposes. The Toomeys first leased the property to Sinclair in 1949 and again in 1956. Defendant Sinclair subleased it to others, who operated it as a Sinclair gasoline station. The lease from the Toomeys to Sinclair entered into in 1956 required the Toomeys to make substantial repairs within four months after its effective date, but none in connection with safeguarding the condition made the basis of the suit. Under the 1956 lease Sinclair first subleased the property to a party not here involved, and subsequently in 1957, subleased it to defendant Muldrow, the occupant at the time of the accident.

The status of the parties therefore is as follows: Defendants Toomey are the owners and original lessors; defendant Sinclair is lessee from the Toomeys and lessor to defendant Muldrow; and defendant Muldrow is lessee from Sinclair.

Taking up the respective positions of the parties *seriatim*, I shall first direct my attention to the defense of the Toomeys, namely, that as lessors, they owed no duty to keep the premises in a safe condition. The law in this jurisdiction is that, absent any statutory or contractual duty, a lessor is not responsible for an injury resulting from a defect which developed during the term of the lease.^{3/} No statute has been

^{3/} *Bowles v. Mahoney*, 91 U.S. App. D.C. 155, and cases cited therein (1952), cert. den., 73 S. Ct. 505

brought to my attention dealing with the question here involved. So far as the contractual relations between the Toomeys and Sinclair are concerned, the lease from the Toomeys to Sinclair provided that the Toomeys would maintain in good condition the roof, walls, foundations and underground sewer and water lines, not involved herein; that all other repairs of any nature were to be made and paid for by Sinclair, but that Sinclair would make no structural changes without consent of the Toomeys. In my opinion, the insignificant safeguard necessary to make the stairwell safe, such as a rail, sign, or adequate lighting, the existence of which last-named was in dispute, as above stated, would not fall within the clause prohibiting the making of structural changes without the consent of the Toomeys. But assuming that it does, Sinclair was under obligation to make the changes on condition that the Toomeys gave their written consent. No request for such consent was made by Sinclair, and it is difficult for me to follow the argument that they were under no duty in this respect because of lack of consent, which was never requested. To me it is untenable that a lessee who has the duty to make repairs conditioned on consent can escape responsibility by the simple expedient of not requesting consent. There being no statute, and under the foregoing construction of the lease, no contractual obligation on the part of the Toomeys to make repairs, they would be absolved from liability under the general law above referred to, except for the fact that the defect or condition here involved did not develop during the term of the lease,^{3/} but was in existence at the time of its commencement and long prior thereto. Under such circumstances, the law immunizing landlords from responsibility for injuries resulting from defects has no application, but, on the contrary, when the condition or defect complained of is, as here, in the nature of a public nuisance, existed, was obvious, and was known to the landlord at the time of the entry into the lease, the landlord, as well as the tenant, are responsible for injuries to third persons

resulting from the maintenance of such condition.^{4/}

Defendant Sinclair contended, contrary to my view hereinabove expressed, that the contractual burden was on the Toomeys to make the necessary changes to provide safeguards because of the consent requirement in the lease. Assuming, arguendo, that it was, Sinclair does not thereby improve its position, because, as a landlord, it had the same duty as the Toomeys, and, like them, is not immunized from liability for damages growing out of the maintenance of this condition existing at the time of its lease to Muldrow.^{4/} Sinclair further contended that it was only an intermediary lessor or conduit between the Toomeys and Muldrow, and that this fact in some occult way relieved it of liability. No authority has been submitted to me in support of this proposition, but such case law as I find seems to the contrary.^{5/}

Defendant Muldrow argued, as I recall,^{6/} that it is not responsible by reason of the provisions of the lease between himself and Sinclair. That lease provides that Muldrow should make no alterations, changes or additions without first procuring the written consent of Sinclair; that all work done by him shall be at his sole cost, and that alterations, changes or additions so made by him shall become the property of Sinclair. What I have said in respect of the lease between the Toomeys and Sinclair in respect of consent, applies equally to Sinclair and Muldrow, because no written consent was requested by Muldrow to make any alteration,

^{4/} Cool v. Rohrbach, 21 S.W. (2d) 919, 921 (1929)
^{5/} Updegraff v. City of Ottumwa, 210 Ia. 382, 226 N.W. 928, 929, 930 (1929)

Simms v. Kennedy, 74 Fla. 411, 76 So. 739, 740 (1917)
 Hill v. Norton, 74 W. Va. 428, 82 S.E. 363, 365 (1914)
 Childress v. Lawrence, 220 N.C. 195, 16 S.E. 2d 842 (1941)
 Fraser v. Kruger, C.C.A. S.D., 298 Fed. 693, 697 (1924)
 Crogan v. Schiele, supra
 Tomle v. Hampton, supra
 32 Am. Jur. Landlord & Tenant sec. 757

^{6/} Timlin v. Standard Oil Co. of N.Y., 126 N.Y. 514, 27 N.E. 786, 788

^{6/} Except for small portions, no transcript of the trial has been prepared.

change or addition to protect the public against the excavation, and it would strain my credulity, to say the least, to believe that if such a request had been made, it would have been refused. In addition, Muldrow, as the occupant of the premises, had the inescapable duty to safeguard the public against the injury here involved.^{7/}

My view, therefore, is that the effort on the part of each defendant to throw the onus of blame on another cannot be sustained, and that each of the defendants is responsible for the maintenance of this public nuisance known to each and existing throughout, and long before, the term of the respective lease herein involved. Accordingly, I hold that each is answerable, equally with the others, for damages to a third person who was injured thereby.

The motion for judgment n.o.v. so far as it relates to this second ground is therefore denied as to each defendant.

With respect to the claim that judgment n.o.v. should be granted on the ground that plaintiff was guilty of contributory negligence as a matter of law, I must construe the evidence most favorably to plaintiff and give her the benefit of every reasonable inference arising therefrom, and then before the motion can be granted, I must conclude that all reasonable men must reach the conclusion that she was contributorily negligent.^{8/} To be sure, plaintiff answered "yes" when she was asked whether it was a fact that when she reached a point where she could not see where she was walking, she kept right on walking, without paying any attention to her safety, until she fell in a hole. But at that moment she reasonably could have believed that she was walking in the public alley, and I cannot say that all reasonable men would reach the conclusion that an ordinarily prudent pedestrian, so circumstanced, would stop and investigate when he reached a point where he could not see, particularly when automobiles

7/ See cases collected under footnotes 2 and 4

8/ *Gunning v. Cooley*, 281 U. S. 90; 50 S. Ct. 231; 74 L. Ed. 720
Jackson v. Capital Transit Co., 69 App. D. C. 147
Shewmaker v. Capital Transit Co., 79 U. S. App. D. C. 102

and pedestrians were passing along the route ahead of him without encountering any difficulty. It comes down to this: Some persons on a public highway would stop when they cannot see what is ahead of them, but I cannot find that all reasonable men would conclude that an ordinarily prudent person would do so, when before him are pedestrians and automobiles passing along the general route without difficulty.^{9/}

I, therefore, deny the motion for judgment n.o.v. on this ground.

So far as the motion for new trial is concerned, one of the points concerns the action of the Court when it became apparent that the jury was about to announce a verdict contrary to its instructions, and another concerns the propriety of giving the so-called "Allen Charge."

These questions arose in the following context:

The case was submitted to the jury at 3:47 p.m. At 6:04 p.m. the jury was brought to the court room and the Court stated to the jury that it was then shortly after 6 o'clock, that they had been deliberating a little over 2-1/2 hours, and that the Court did not wish unduly to interfere with their plans for the evening and therefore would allow them to separate and return the following morning and resume their deliberations. At this point the Court repeated his admonition against discussing the case with anyone or allowing anyone to discuss it with them, and against discussing it amongst themselves until they were again in the jury room the following morning. The Court further stated that the parties were entitled to their judgment uninfluenced by any outside source, and that if there was anything in the newspapers about the case or on the radio or television, they should ignore it.

The jury resumed its deliberations the following morning, and at 4:50 p.m., they were brought into the courtroom, and the Court stated that he had not heard from them and assumed that they had not agreed upon a verdict. He thereupon stated that at this stage of the case he

9/ The following cases in this jurisdiction support this view:

Dashields v. A. B. Moses & Sons, 35 App. D. C. 583, and
Peigh v. B. & O. R. R. Co., 92 U. S. App. D. C. 198

thought he should give them one additional instruction, and then gave them the "Allen Charge." The jury thereupon retired to the jury room. At 5:10 p.m. that day the jury returned and the foreman announced that the jury had agreed upon a verdict. He was asked by the clerk as follows: In the claim of Virginia Warren Daly against defendants Toomey, do you find for the plaintiff or the defendants. The foreman answered, defendants. He was then asked by the clerk: In the claim of Virginia Warren Daly against defendant Sinclair Refining Co., do you find for the plaintiff or the defendant, and the foreman answered, plaintiff. He was then asked by the clerk: In the claim of Virginia Warren Daly against the defendant Muldrow, do you find for the plaintiff or for the defendant, and the foreman answered, defendant. At this point the Court interjected, stating that apparently the jury misunderstood one of his instructions, and directed the jury to retire to the jury room while the Court discussed the question with counsel. After hearing counsel, the Court stated that the purported verdict was inconsistent with his instructions and that he would have to instruct the jury further. Thereupon the jury was brought into the courtroom and the Court stated that the jury apparently misunderstood one of his instructions on the law, when they found against the Sinclair Refining Co. and for the Toomeys and for Muldrow, and then proceeded to instruct them further. The instruction given at this time was in accord with the instruction previously given in his general charge to the jury, and, briefly stated, they were told that if their verdict was based on the exception to the general rule in respect of trespassers or bare licensees, their verdict should be against all three defendants, but that if their verdict was only against the one who failed to turn on the lighting fixtures, if one did fail to turn them on, then in that case only could it be against Muldrow individually. Whereupon the jury retired to their jury room, were taken to dinner shortly after 6 p.m., resumed their deliberations after dinner and were returned to the court room at 11:05 p.m. At this point the Court addressed the foreman, stating that the jury had had this case under consideration since the preceding afternoon, and had been deliberating, as the Court computed it, over 12 hours,

that he had heard nothing from them and assumed they had not reached a verdict. The foreman replied that they had not. Whereupon the Court asked whether, if given more time, he thought they could reach a unanimous verdict. The foreman announced in the affirmative and stated that he thought they would be able to reach a verdict if given a little more time. Thereupon the Court stated that he did not want to appear to be coercive, and, it being shortly after 11 p.m., he would allow them to go their homes and come back the following morning to resume their deliberations. The jury were again admonished as previously. They resumed deliberations the following morning, and at 12:30 o'clock p.m., they returned to the court room and rendered their verdict for plaintiff against each of the defendants in the amount of \$17,000.00.

Defendants contend that the Court erred in preventing the jury from announcing a completed verdict when it became apparent that it would not be consistent with the Court's instructions, and in thereafter sending them back to their jury room for further deliberation after instructing them further. The authorities do not support defendants' contention, but seem adequately to uphold the correctness of the Court's action. A general statement of the law in this regard is contained in 53 Am.Jur. Trial, sec. 1099, and is so completely in point that I quote it in part as follows:

"The principle is general that when a jury return an informal, insensible, or a repugnant verdict, or one that is not responsive to the issues submitted or is in disregard of the instructions of the court, they may be directed by the court to reconsider it and bring in a proper verdict.

/citing cases/ * * * This may be done with or without the consent of counsel, and should be done whether requested or not. /citing cases/ * * * The practice is really only an application of the settled rule that until the verdict has been recorded, or the jury have been discharged as unable to agree, their connection with the case has not come to an end."

This is consonant with the view of this Court in Market Co. v. Clagett, 19 App. D. C. 12, 28. Cf. Small v. Pennsylvania R. R. Co., 65 App. D. C. 112.

It would therefore appear that the Court acted well within its province in pursuing the course it did. If it had permitted the jury to complete its verdict, it would have been necessary to set it aside, as contrary to law, and grant a new trial. If the Court had discharged the jury then, as one of counsel for defendants suggested, a second trial likewise would have been required. I cannot believe the law envisages any such duplication of effort and expense under the circumstances here involved.

So far as the complaint against giving the "Allen Charge" is concerned, no authority is cited by defendants to support their claim that it was erroneously given, and I see nothing improper or coercive about it under the facts above set forth.

The contention is also made in the joint "Points and Authorities" that certain evidence was improperly excluded. This evidence was to the effect that, after the accident, the Toomeys erected a railing around the stairwell. In my opinion this was inadmissible under the general rule excluding such evidence.^{10/} Neither did it fall within the exceptions referred to in Fine v. Giant Food Stores, Inc., 163 F. Supp. 231, inasmuch as ownership and control and contractual obligations included in the exceptions and relied on by defendants are not dispositive of liability to plaintiff, as hereinabove discussed. Its relevancy could only arise in connection with a decision on the respective cross claims for indemnity and contribution, but these were reserved for decision by the Court by stipulation of counsel and were not before the jury.

The tender of this evidence was understandably objected to by counsel for defendants Toomey, and I sustained his objection. Nevertheless, the same counsel now claims that it was error to exclude it.

I feel that the verdict was excessive, but nothing in the case shows that it was induced by passion or prejudice or was of a "monstrous"

^{10/} Altemus v. Talmadge, 61 App. D. C. 148, 152

Avery v. S. Kann Sons Co., 67 App. D. C. 217, 218

variety. In the exercise of my discretion, however, I believe that the judgment is one which warrants a remittitur. Accordingly, if plaintiff, within ten days from the date of my order herein, shall file a remittitur of that part of the verdict and judgment in her favor in excess of \$12,000.00, the motion for a new trial will be denied as of the date of filing the remittitur; otherwise, the motion for a new trial will be granted.

Order in accordance herewith will be entered.

/s/ David A. Pine
Judge

Date: January 10, 1963

[Filed January 10, 1963]

ORDER

Upon consideration of defendants' "Motion To Set Aside Verdicts And Judgments And To Enter Judgments In Favor Of Defendants In Accordance With Their Motions For Directed Verdicts Pursuant To Rule 50 (b), Federal Rules Of Civil Procedure, Or In The Alternative For A New Trial," it is by the Court this 10th day of January, 1963,

ORDERED, that said Motion to set aside verdicts and judgments and to enter judgments in favor of defendants in accordance with their motions for directed verdicts pursuant to Rule 50 (b) Fed. R. Civ. P., be and the same is hereby denied in accordance with written opinion filed herein.

It is FURTHER ORDERED, that if within ten days from this date plaintiff shall file a remittitur of that part of the verdict and judgment in her favor in excess of \$12,000.00, the motion for new trial will be denied as of the date of the filing of said remittitur; otherwise said motion will be granted.

/s/ DAVID A. PINE
Judge

[Filed January 30, 1963]

JUDGMENT

Upon consideration of the cross-claims of the respective parties defendant herein, and pursuant to Findings of Fact and Conclusions of Law filed herein, it is by the Court this 29th day of January, 1963,

ORDERED, that the following judgments be entered:

1. That defendants James C. Toomey and John J. Toomey shall have judgment for contribution from defendant Sinclair Refining Company and from defendant William T. Muldrow, in equal amounts of any sums which said defendants Toomey shall pay in satisfaction of the judgment herein which shall be in excess of one-third of said judgment.
2. That defendant Sinclair Refining Company shall have judgment for contribution from defendants James C. Toomey and John J. Toomey and from defendant William T. Muldrow, in equal amounts of any sums which said defendant Sinclair Refining Company shall pay in satisfaction of the judgment herein which shall be in excess of one-third of said judgment.
3. That defendant William T. Muldrow shall have judgment for contribution from defendants James C. Toomey and John J. Toomey and from defendant Sinclair Refining Company, in equal amounts of any sums which said defendant William T. Muldrow shall pay in satisfaction of the judgment herein which shall be in excess of one-third of the judgment.
4. That the cross-claim of defendant Sinclair Refining Company for indemnity against defendants James C. Toomey and John J. Toomey be denied and that the said cross-claim be and the same hereby is dismissed.

/s/ David A. Pine
United States District Judge

CONSENT AS TO FORM:

JACKSON, GRAY & LASKEY

By /s/ John L. Laskey
Attorneys for Plaintiff

WELCH, DAILY & WELCH

By /s/ H. M. Welch
Attorneys for Defendant Muldrow

/s/ Harry L. Ryan, Jr.
Attorney for Defendants Toomey

HOGAN & HARTSON

By /s/ John P. Arness
Attorneys for Defendant Sinclair

[Filed March 1, 1963]

NOTICE OF APPEAL

Notice is hereby given this 1st day of March, 1963, that defendant Sinclair Refining Company hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of December, 1962 in favor of plaintiff Virginia Warren Daly against said defendant Sinclair Refining Company, and from the judgment of this Court entered on the 30th day of January 1963 for contribution in favor of defendants James C. Toomey and John J. Toomey and defendant William T. Muldrow against said defendant Sinclair Refining Company.

/s/ John P. Arness
Attorney for Defendant
Sinclair Refining Company

[Filed March 1, 1963]

NOTICE OF APPEAL

Notice is hereby given this 1st day of March, 1963 that James C. Toomey and John J. Toomey, Trustees, u/w of Ellen C. Toomey, deceased, defendants hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of December, 1962, in favor of plaintiff, Virginia Warren Daly, against said defendants, and from the judgment of this Court

entered on the 30th day of January, 1963, allowing defendant, Sinclair Refining Company judgment for contribution from these defendants.

/s/ Harry L. Ryan, Jr.
Attorney for Defendants,
James C. Toomey and
John J. Toomey, Trustees,
815 - 15th Street, N. W.,
Washington, D. C.

[Service]

[Filed February 27, 1963]

NOTICE OF APPEAL

Notice is hereby given this 27th day of February, 1962, that William T. Muldrow hereby appeals to the United States Court of Appeals for the District of Columbia from the judgment of this Court entered on the 5th day of December, 1962 in favor of Virginia Warren Daly against said Muldrow.

/s/ H. M. Welch
Attorney for William T. Muldrow
505 Investment Building

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,759

WILLIAM T. MULDROW,

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 20 1963

Nathan J. Paulson
CLERK

H. MASON WELCH

J. HARRY WELCH

J. JOSEPH BARSE

WALTER J. MURPHY, JR.

JAMES A. WELCH

1511 K Street, N. W.
Washington 5, D. C.

Attorneys for Appellant.

(i)

STATEMENT OF QUESTIONS PRESENTED

1. May the jury be allowed to speculate as to the cause of the plaintiff's injury when the plaintiff's own evidence is conflicting and presents two causes, for only one of which the defendant may be liable?
2. Whether the plaintiff was contributorily negligent as a matter of law when by her own testimony, she proceeded to walk in a dark and unfamiliar area without taking any precautions for her own safety?
3. Whether the Trial Court was in error in refusing to discharge the jury when the jury demonstrated an inability to reach a verdict which the Court considered consistent with the charge?
4. Whether in a case of unliquidated damages, the Court may abrogate a litigant's right to trial by jury and substitute his judgment as to the damages?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,759

WILLIAM T. MULDROW,

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

This is an appeal from the judgment of the United States District Court for the District of Columbia entered upon a jury verdict in favor of Appellee against the Appellant. A motion for a new trial or for Judgment NOV was seasonably filed and thereafter denied by the United States District Court. This Court has jurisdiction under Title 28-1291 of the U. S. Code.

STATEMENT OF THE CASE

This appeal is taken from a judgment in favor of the Plaintiff, Appellee, Mrs. Daly, which was rendered as compensation for injuries she received on June 12, 1958 on premises owned by the Toomey Estate, a defendant in the Court below, which had been leased to Sinclair Oil Company, also a defendant below, who had subleased the premises to Appellant, Muldrow. The judgment was rendered against all three defendants jointly.

The premises in question consisted of a gas station at the corner of V Street and Georgia Avenue, N. W., the western boundary of the station proper being an alley running from V Street to U Street, N.W. On the west side of the alley was another structure pertaining to the operation of the gas station, namely a lubricating bay. On the west end of the gas station building facing the alley was a stairwell going down into the basement of the gas station building. It was into this stairwell that the Plaintiff, Mrs. Daly, fell.

On the evening of the accident, Mrs. Daly, who was then Miss Virginia Warren, had a date with a Mr. Lawrence to attend a baseball game at Griffith Stadium. Mrs. Daly alighted from Mr. Lawrence's car just after he had pulled into the alley adjacent to the gas station and did not notice where Mr. Lawrence's car was parked (J.A. 26). After the game she and Mr. Lawrence walked along the sidewalk on the south side of V Street adjacent to the gas station heading in a westerly direction until they reached the alley where they turned left and headed south down the alley (J.A. 27). As they proceeded down the alley there were cars with headlights on coming single file in the alley heading north toward V Street and there were many pedestrians heading south in the alley (J.A. 27, 35). Mrs. Daly testified that she and Mr. Lawrence walked abreast until they were near the end of the station building adjacent to the alley where they encountered a car parked parallel to the west wall of the station building (J.A. 28). Mrs. Daly could not recall whether

this car was heading north or south in the alley (J.A. 28). She stepped ahead of Mr. Lawrence and to her left to "go down a passageway between the parked car and the building" (J.A. 28). She did not recall if any of the other pedestrians took this route (J.A. 28, 37). The space between this parked car and the building was single file space (J.A. 60). Mrs. Daly did not see any other cars parked in a line facing V Street along the east side of the alley (J.A. 54). Mrs. Daly took 4 or 5 steps after proceeding ahead of Mr. Lawrence and before she fell (J.A. 56).

As Mrs. Daly walked alongside this parked car she stated it became darker and variously stated that she could not see the ground (J.A. 61) and that she did not know whether she could have seen the stairwell had she looked at the ground (J.A. 59). Mrs. Daly could also not remember whether she slowed her pace in this darkened area (J.A. 59). In any event she stated she was looking as she normally would, probably ahead (J.A. 59). On cross examination, she stated she arrived at a point somewhere after stepping ahead of Mr. Lawrence and before she fell at which point she said she could not see (J.A. 61). She placed this point at about half way along the side of the parked car (J.A. 62). It was a couple of steps beyond this point that she fell (J.A. 62) but it might also have been two or three steps (J.A. 63). Finally she was asked:

"Q. Well, is it a fact that so far as your best recollection is concerned that when you reached a point where you couldn't see where you were walking, without paying any attention to your safety you kept right on walking until you fell in a hole? Is that what happened?"

"A. Well --

"Q. Is that what happened?

"A. Yes."

Mr. Lawrence was presented as a witness and testified that he parked his car on some vacant property somewhere down the alley and returned to Mrs. Daly who had gotten out of the car and they proceeded to the ball game (J.A. 66). He described their route back to the alley much as Mrs. Daly had and stated he had no distinct recollection of any

cars parked on his left as they proceeded south in the alley (J.A. 68). He testified that some other persons entered the alley at about the same time as he and Mrs. Daly, and that there were 4, 5 or 6 cars coming out of the alley with their headlights on, and that there was "no shortage of light" (J.A. 71, 72). Mr. Lawrence, in contrast to Mrs. Daly, stated they proceeded in a straight line to the place of the accident without any deviations (J.A. 73). Mr. Lawrence also denied there was a car parked at the place of the fall (J.A. 76). In agreement with Mrs. Daly, Mr. Lawrence testified that she did not stumble prior to her fall (J.A. 74, 65).

Mr. Lawrence testified that after Mrs. Daly had fallen he could see her (J.A. 75), and he could see the ledge or coping around the stairwell (J.A. 75), and in general he testified with regard to lighting as follows:

"Q. As a matter of fact, Mr. Lawrence, as you proceeded along this route you had no difficulty in seeing at any time, did you, sir?"

"A. I had no difficulty in seeing, no, sir."

A Mr. Robert Smith was also called as a witness by the Plaintiff and he testified that he had been at the game with a Miss Riley, and they were returning to their car and were immediately behind the couple he later found out was Mrs. Daly and Mr. Lawrence (J.A. 40, 41). He testified he was five to six feet behind Mrs. Daly at the time she fell who was ahead of Mr. Lawrence (J.A. 42). Mr. Smith stated that because of cars coming north in the alley that they all proceeded between a line of cars parked facing Georgia Avenue and a line of cars parked along the east side of the alley, facing north (J.A. 41). This latter line of cars Mrs. Daly and Mr. Lawrence denied being there.

Mr. Smith stated it was dark and the passage was narrow so you had to pick your way and walk slower than normal (J.A. 46), and also that there was a car parked practically up to the stairwell but not blocking it (J.A. 48). Mr. Smith stated as they walked along he could see the figures ahead of him and that Mrs. Daly's head just disappeared

(J.A. 42). He stated at one point that it was completely dark where the stairwell was (J.A. 43), and at another that "there wasn't any point where you couldn't absolutely see completely, that I know of" (J.A. 52). Mr. Smith agreed with Mr. Lawrence and disagreed with Mrs. Daly, stating they walked south in a straight line rather than deviating (J.A. 45).

Miss Riley also testified that there was no car parked adjacent to the stairwell causing a deviation (J.A. 86). She stated that it was dark as soon as they turned into the alley but not so dark that they could not see where they were walking (J.A. 77, 79, 84). Miss Riley did not see Mrs. Daly fall as she was behind Mr. Smith, but she was approximately the distance from the witness box to the far end of the jury box from the stairwell when Mr. Smith said someone had fallen (J.A. 82). Miss Riley remained where she was and Mr. Smith proceeded forward (J.A. 81) but she could only see him for about half the distance from where he left her to the place she later found the stairwell to be (T. 278). She later walked to where the stairwell was and could not see it until she was the width of the top of the jury box + 18 inches from the stairwell (T. 282).

Mr. Muldrow, the appellant, testified about all the lights in the station proper (J.A. 94, 95, 97) which consisted of 3 sets of fluorescent lights on each of the two pump islands, a large flood light sign at Georgia Avenue and V Street, lights in the building proper, and 2 floodlights on the lubricating building which shed light on the stairwell, all of which were lighted. Mr. Muldrow also said there was no line of cars parked on the east side of the alley facing V Street and there was no car parked adjacent to the stairwell (J.A. 97, 99).

Mr. Toomey also testified that the floodlights on the lubricating building would illuminate the stairwell (J.A. 116).

The jury was instructed by the Court that they might find against any one of the Defendants separately or against all three of the Defendants jointly (Charge to Jury, J.A. 126). After the jury had been deliberating for approximately eight hours, the Court gave the jury the Allen

Charge to which all Defendants objected (Further Instructions to the Jury and Verdict of the Jury, J.A. 136 i, 136k). Following the Allen Charge, the jury returned in twenty-one minutes with a verdict exonerating this Appellant and the Defendant, Toomey, and finding for the Plaintiff and against the Defendant, Sinclair Refining Co., (Further Instructions to the Jury and Verdict of the Jury, J.A. 136i, 136k). The Court refused to receive the verdict of the jury on the basis it was an inconsistent verdict, not proper under the Court's charge. The jury was then instructed that they must find against all of the Defendants or against Muldrow individually. (Further Instruction to the Jury and Verdict of the Jury, J.A. 136n). The jury again retired and after some further hours of deliberation returned with a verdict against all three Defendants in the amount of \$17,000.00. (Further Instruction to the Jury and Verdict of the Jury, J.A. 136q, 136r).

All three Defendants moved for a Judgment NOV or for a new trial and the Trial Court denied the Motion for Judgment NOV, and ordered a new trial because of the excessiveness of the verdict, but conditioned granting of a new trial upon a remittitur of \$5,000.00, which remittitur was filed by the Plaintiff.

STATEMENT OF POINTS

I.

The Plaintiff, having proved two different states of fact, only one of which permits liability against the Defendant, the Plaintiff has proved nothing.

II.

The Plaintiff was guilty of contributory negligence as a matter of law.

III.

The jury's malfunction was of such a nature and extent that the Trial Court was in error in not granting an unconditional new trial.

SUMMARY OF ARGUMENT

I.

The Plaintiff afforded testimony that the stairwell in question was dangerous because it was obscured by darkness. Plaintiff also afforded testimony that there was "no shortage of light". In the latter instance the stairwell could not have been dangerous and no liability could be attached to this Defendant, Appellant. The Plaintiff having proved two states of fact for only one of which could this Defendant be possibly liable the Plaintiff has failed to prove anything.

II.

The Plaintiff herself testified that she reached a point some two or three steps from the stairwell when she could no longer see where she was walking, yet she testified that she continued to walk along normally and, in fact, walked without paying attention to her safety until she fell into the stairwell. On this statement of evidence, the Trial Court should have directed a verdict against the Plaintiff. On her own testimony she was guilty of contributory negligence as a matter of law.

III.

The length of the jury's deliberation; the contradictory charges to the jury; the giving of the Allen Charge and the contradictory verdicts all resulting in a verdict excessive by almost one-third indicates confusion and malfunction on the part of the jury which requires these Defendants be given a new trial before a properly instructed and properly functioning jury. The attempt to remedy this situation by a remittitur was in error.

IV.

There is no basis in this jurisdiction for correcting an excessive jury verdict in a case of unliquidated damages by the use of remittitur. Having found an excessive verdict, the Court should grant an unconditional new trial.

ARGUMENT

I.

When A Plaintiff Proves Two Statements of Fact
For Only One of Which Defendant Can Be Liable,
The Plaintiff Has Failed to Prove Anything.

The Plaintiff herein testified variously that it was so dark that she did not see the stairwell, and that she did not know whether she could have seen the stairwell had she looked. However, accepting her testimony that it was so dark she could not see as being the sum and substance of her testimony, she also offered testimony through Mr. Lawrence that there was "no shortage of light", and that following Mrs. Daly's fall he could see her at the place where she had fallen into the stairwell and also the ledge or coping. He testified finally that "I had no difficulty in seeing, no sir".

The Plaintiff having offered both testimony of herself and Mr. Lawrence, is, of course, bound by the testimony of both. The other two witnesses, Mr. Smith and Miss Riley, described the light in terms somewhat between the testimony of Mrs. Daly and Mr. Lawrence.

No one could say that the maintenance of a stairwell which is clearly visible is dangerous. Therefore, on testimony of Mr. Lawrence, this Defendant could not possibly be liable. Testimony of Mrs. Daly and the other two witnesses, Mr. Smith and Miss Riley, would permit a finding of negligence.

In Selby v. S. Kann Sons Co. (1934), 64 App. D.C. 36, 73 F.2d 853, this Court stated, in reliance on a long line of Supreme Court decisions, that where an accident may be due to one of several causes for some of which Defendant is legally responsible and for some of which he is not, there is such a profound failure of Plaintiff's proof that a verdict for Defendant should be directed.

In the instant case Plaintiff testified that she fell because of the darkness of the stairwell and surrounding area. The Plaintiff also

presented, and is bound by, Mr. Lawrence's testimony that the stairwell and surrounding area was not dark and therefore not dangerous. On this state of the evidence and on the authority of Selby v. S. Kann Sons Co., the Court should have directed a verdict.

II.

The Plaintiff Was Contributorily Negligent as a Matter of Law.

It is conceded that normally questions of negligence and contributory negligence are for the jury and not the Court. "But where the facts clearly appear from the undisputed evidence, where they are such that, conceding every legitimate inference, but one reasonable conclusion may be drawn, the issue is one of law for the Court." Brown v. Clancy, (D.C. Mun. App. 1945) 43 A.2d 296.

Conceding every legitimate inference to the Plaintiff, we must concede that when she was two or three steps removed from the place where she fell the condition of the light was either so dark that she could not see or very dark but she does not know if she could have seen the stairwell had she looked. In any event, she proceeded to walk normally and without regard to her safety. In either case, the Plaintiff was guilty of contributory negligence as a matter of law. If the Plaintiff found herself at a place with which she was not familiar, in total darkness, she had actual knowledge of the danger of the situation, and her continuing to walk along normally without regard to her safety was negligent as a matter of law. As stated in Safeway Stores, Inc. v. Feeney (D.C. Mun. App. 1960), 163 A.2d 624, p. 627:

"However, if one possesses actual or constructive knowledge of those facts sufficient to put an ordinary person on notice to a dangerous situation created by the negligence of another, it is contributory negligence to fail at that time to exercise a degree of care commensurate with the known circumstances."

It is submitted that this means that an ordinary person exercising reasonable care would not walk along normally and fail to take some precaution for his own safety when suddenly plunged into absolute darkness in a strange place.

If we allow the plaintiff the inference that it was very dark but she may have been able to see had she looked, she was still guilty of contributory negligence for she continued to walk normally while looking straight ahead, and took no precautions for her safety when she found herself in a darkened strange place. For as stated in Brown v. Clancy, supra, a person has not only the duty to look, but to look effectively. On Mrs. Daly's own testimony she did not even look, accepting this alternative version of her testimony. Therefore, no matter which version of her testimony might be accepted, she is precluded from recovery by her own disregard of her safety.

III.

The Trial Court Was in Error in Refusing to Grant An Unconditional New Trial Following the Obvious Confusion in the Jury's Deliberation Compounded By the Allen Charge Which Resulted in a Verdict Which the Trial Court Found to Be Excessive.

In the Trial Court's charge to the jury, the Court stated that each Defendant was entitled to consideration of his own defense separately and that it did not follow if one was liable the others were liable. After the charge to the jury, it was pointed out by counsel for one of the Co-Defendants that, as the Court had conceived the case in the Court's prior discussion with counsel, the jury could only find a verdict against all three Defendants jointly for the maintenance of the conditions or against the Defendant, Appellant herein, Muldrow, for failure to use the light fixtures which were present. The Court stated at the Bench that the Court did not feel the charge left the jury the option of finding against any of the Defendants separately except as against Muldrow.

After some eight hours of deliberation, the jury had not reached a verdict, but also had not indicated any inability to reach a verdict. However, *sua sponte*, the Court determined to give the Allen Charge. This Charge was given over objection of counsel for all three Defendants. Although the jury was not able to reach a verdict in the eight hours of deliberation, twenty-one minutes after the Allen Charge the jury returned with a verdict in favor of this Defendant, Appellant, and in favor of the Co-Defendant, Toomey, and against the Defendant, Sinclair Refining Co. The Court refused to receive this verdict as the Court's conception of the case required a verdict against all three Defendants or against this Defendant, Appellant, separately, and the Court so instructed the jury and returned them for further deliberation. This procedure was objected to on behalf of this Defendant as coercive. The jury had been deliberating for some eight hours without being able to reach a verdict and then within twenty-one minutes of the Allen Charge, the jury returned with a verdict consistent with the first charge. This Defendant urged then and urges now that if the Trial Court felt the verdict improper as a matter of law, the jury should have been discharged, not coerced into finding a new verdict in conformity with the new charge.

After some further hours of deliberation, the jury returned with a verdict in favor of the Plaintiff and against all three Defendants in the amount of Seventeen Thousand Dollars (\$17,000.00).

The Trial Court ultimately determined that this verdict was excessive by nearly one-third of its gross amount. It is submitted that this grossly excessive verdict reached after very lengthy deliberations during which the jury was given the coercive language of the Allen Charge, together with reaching one verdict which the Court refused, demonstrates a fundamental malfunction in the jury and a determination by the Trial Court to force the jury to a determination against the Defendants. After the eight hours of deliberation and the Allen Charge resulting in a verdict which was improper, the Court below should have discharged the jury and granted these Defendants a new trial.

IV.

The Court Below, Having Found the Verdict to Be Excessive, Was Required to Grant a New Trial.

On the Defendants' motion for judgment n.o.v. or in the alternative for a new trial, the Trial Court found the verdict to be excessive and ordered a new trial on the condition that the Plaintiff agreed to a remittitur in the amount of Five Thousand Dollars (\$5,000.00).

In a case involving unliquidated damages, the Trial Court was in error in conditioning the granting of a new trial by giving the Plaintiff the option of accepting Twelve Thousand Dollars (\$12,000.00) and perforce giving the Defendants no right to object.

The suspect practice of remittitur was given a thorough airing by the Supreme Court in the case of Dimick v. Schredt, (1934) 293 U.S. 474. The Court therein could find no logical or common law basis for depriving a Defendant of the right to have his liability and the amount thereof determined by a jury. However, the Court did say that inasmuch as the courts had used the device of remittitur for some period of time that its continued use would be sustained. But what has been the practice of the courts in this jurisdiction with regard to remittitur?

Our own courts have taken cognizance of the difficulty of using remittitur in cases of unliquidated damages and in the reported cases have used it only where the damages are liquidated or so nearly ascertainable as to be virtually liquidated. In Boyle v. Bond (1951), 88 App. D.C. 178, 187 F.2d 362, this Court approved a remittitur with the observation that:

"The claim for commissions due was susceptible of and required proof of a definite amount. As for damages, they could be proven with a fair degree of certainty. ..."

In the case of Munsey v. Safeway Stores (1949), 65 A.2d 598, our Municipal Court of Appeals stated at 601:

'It is finally urged on this point that this Court should reinstate the first verdict and order such remittitur as it deems proper to remove the excess of the verdict. In the states there is an established practice of ordering a remittitur in appellate courts even in tort cases where the damages are unliquidated, but in federal jurisdictions the practice seems to be limited to contract cases and the like where the excess amount of the verdict can be fairly well determined. No case in a federal jurisdiction has been called to our attention where an appellate court undertook to cure by remittitur an excessive verdict rendered in a tort action for unliquidated damages.'

See also Lalley v. Escoett (1945), 79 App. D.C. 306, 146 F.2d 667; Fidelity Storage Co. v. Kingsbury (1935), 64 App. D.C. 208, 76 F.2d 978; A. S. Abell Co. v. Ingham (1915), 43 App. D.C. 582; Holiday Homes, Inc. v. Briley, (D.C. Mun. App. 1956), 122 A.2d 229; Fred Drew Const. Co. v. Mire (D.C. Mun. App. 1952), 89 A.2d 634; but see Flannery v. Baltimore and O. R. Co. (1885), 4 Mackey 111, 15 D.C. 111.

The vice of remittitur in cases of unliquidated damages is discussed at length in an excellent article by Professor Leo Carlin, entitled, "Remittitur and Additur" appearing in 49 West Virginia Law Quarterly. If the Trial Court reduces the verdict to the maximum amount that it could tolerate, the Court is requiring the Defendant to accept what is still in a practical and real sense an excessive verdict. If the Trial Court reduces the verdict to what the Court thinks is a reasonable amount, it is in effect depriving the Defendant of his right to a trial by a properly functioning jury by substituting the Court's own notion of what a jury would properly award.

This difficulty is, of course, not present in the situation where the damages are susceptible of a mathematical computation as in the case of unliquidated damages. In such a situation if the jury ignores the evidence on damages, the Court has a real basis for determining the proper remittitur.

Therefore, the practice in this jurisdiction to limit remittitur as an alternative to the granting of a new trial has followed the reasonable

and logical approach of limiting the use of this alternative to cases of liquidated or ascertainable damages. The Trial Court was in error in not following this practice and granting the Defendants an unconditional new trial because of the obvious excessiveness of the verdict.

CONCLUSION

The Trial Court was in error in not granting this Defendant judgment because the Plaintiff proved two states of fact only one of which would allow liability against this Defendant. The Trial Court should also have granted this Defendant judgment as the Plaintiff was guilty of contributory negligence as a matter of law.

The Trial Court was in error in not granting a new trial because of the malfunctioning of the jury deliberations and because of the excessiveness of the verdict.

Respectfully submitted,

H. MASON WELCH

J. HARRY WELCH

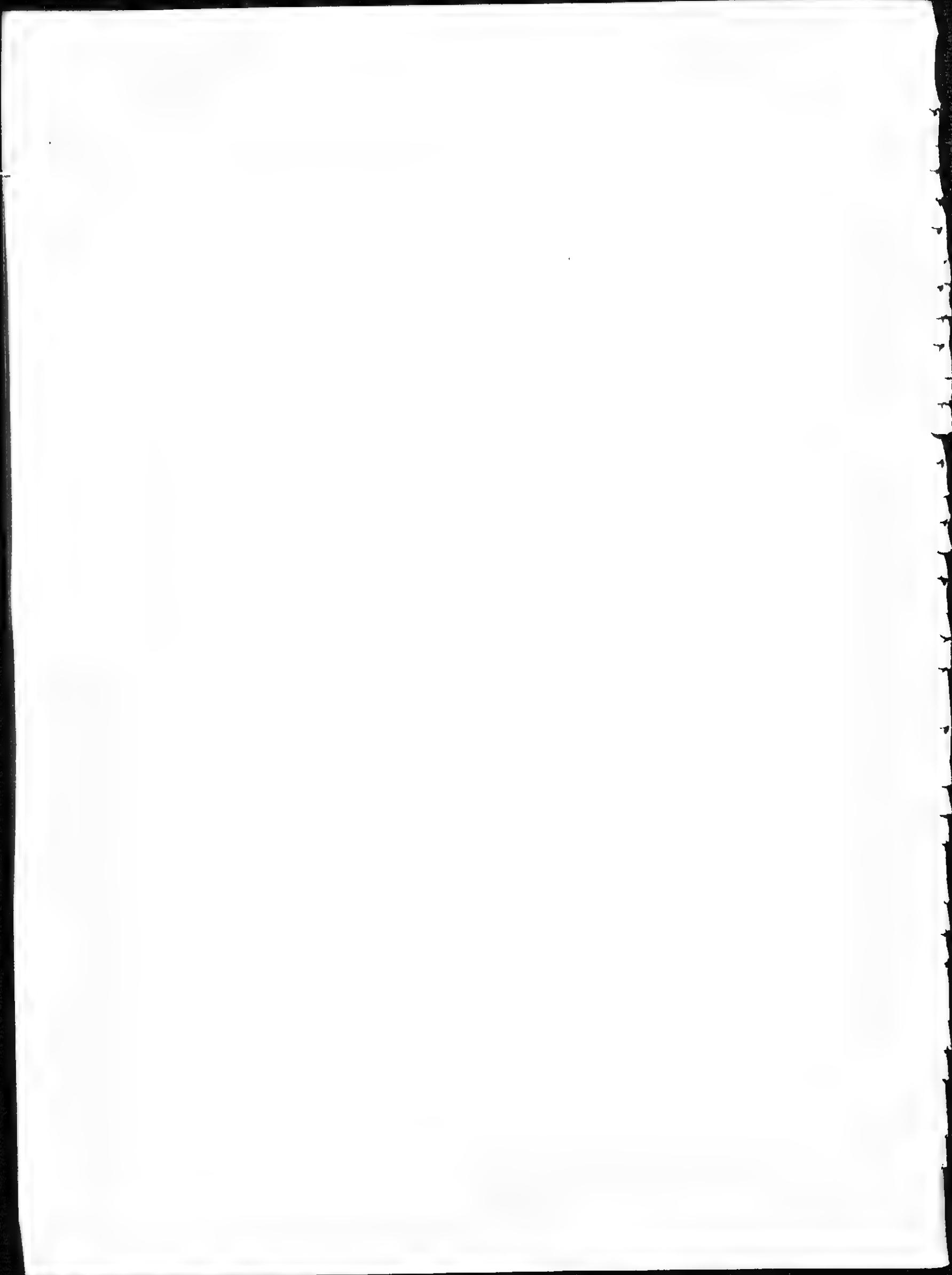
J. JOSEPH BARSE

WALTER J. MURPHY, JR.

JAMES A. WELCH

1511 K Street, N.W.
Washington 5, D.C.

Attorneys for Appellant.



BRIEF FOR VIRGINIA WARREN DALY, APPELLEE

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,759

WILLIAM T. MULDROW,

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

No. 17,875

JAMES C. and JOHN J. TOOMEY, Trustees,

Appellants,

v.

VIRGINIA WARREN DALY,

Appellee.

No. 17,879

SINCLAIR REFINING CO.,

Appellant,

United States Court of Appeals
for the District of Columbia Circuit

v.

VIRGINIA WARREN DALY,

Appellee.

Nathan J. Paulson
CLERK

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

MARVIN J. COLES

1000 Connecticut Avenue, N. W.
Washington 6, D. C.

Of Counsel

JOHN L. LASKEY
THOMAS S. JACKSON
ROBERT M. GRAY

1025 Connecticut Avenue, N.W.
Washington 6, D. C.

Attorneys for Appellee

APPELLEE'S COUNTERSTATEMENT OF
THE QUESTIONS PRESENTED

1. Are a landlord, tenant and sub-tenant of real property, all of whom retain control for purposes of effecting repairs thereto, jointly liable for injuries caused by a dangerous condition negligently maintained thereon, to a plaintiff who enters upon the property in a reasonable belief he is upon a public highway which is induced by an appearance of the continuation thereof created by the defendants?
2. Is a conflict in the testimony of plaintiff's witnesses as to the degree of illumination in the vicinity of the place of injury, at which defendants were alleged to have negligently maintained a dangerous condition which caused plaintiff's injury, properly submitted to the jury as a question of the credibility and weight of evidence?
3. Is the violation of parking regulations by unknown third persons not parties to the action irrelevant to the question of whether their vehicles were so parked as to constitute an intervening cause of plaintiff's injury, thus insulating defendants from liability for their negligence?
4. May a trial court in the District of Columbia, in the exercise of the court's sound discretion, reinstruct a jury and return it for further deliberation, when the jury returns a verdict repugnant to its original instructions, without thereby producing a coerced verdict?
5. May a trial court in the District of Columbia, in the exercise of its sound discretion, deny defendants' motions for a new trial upon the condition that plaintiff file a remittitur as to so much of a verdict in her favor as the court deems excessive?



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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,759

WILLIAM T. MULDROW,

Appellant,

v.

VIRGINIA WARREN DALY,

Appellee.

No. 17,875

JAMES C. and JOHN J. TOOMEY, Trustees,

Appellants,

v.

VIRGINIA WARREN DALY,

Appellee.

No. 17,879

SINCLAIR REFINING CO.,

Appellant,

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Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR VIRGINIA WARREN DALY, APPELLEE

APPELLEE'S COUNTERSTATEMENT OF THE CASE

Statement of Undisputed Facts

The premises at the corner of Georgia Avenue and V Street, N.W. Washington, D. C., owned of record by John J. and James C. Toomey, trustees, and improved by structures and equipment appurtenant to a gasoline service station, were leased in September, 1956 by the Toomeys to the Sinclair Refining Company (Plaintiff's Exhibit 7). Sinclair Refining Company sub-leased the premises to William T. Muldrow in December, 1957 (Plaintiff's Exhibit 6), who was operating a service station thereon on the night of June 12, 1958. (J.A. 88). The property is bounded to the east by Georgia Avenue, to the north by V Street, and to the west by an unnamed public alley. Access to a cellar beneath the service station building is afforded by a stairwell constructed against the west wall thereof, immediately adjacent to the public alley. (Plaintiff's Exhibit 2A). The stairwell was, on June 12, 1958, in an open, unguarded, and unlighted condition (Plaintiff's Exhibit 2A, J.A. 90) and had been in that condition since the date of the lease from the Toomeys to Sinclair. (J.A. 101).

On June 12, 1958, Mrs. Daly (then Virginia Warren), accompanied by William Lawrence, attended a night baseball game at Griffith Stadium, being driven to the ball park in Mr. Lawrence's car which he parked, about 8:00 p.m., in a lot accessible from the alley adjoining the service station. Mrs. Daly did not accompany Mr. Lawrence into the parking lot, but left the car in the alley a few feet from V Street and waited there for Mr. Lawrence to park and return to escort her to the stadium. (J.A. 26). About 10:30 p.m., after the game, Mrs. Daly and Mr. Lawrence returned to the car, walking with numerous other pedestrians north along Georgia Avenue, turning west on the V Street sidewalk, and from the sidewalk south into the alley next to the service station. Other pedestrians ahead were walking in the same direction;

automobile traffic to their right was moving in the opposite direction, proceeding north towards V Street against the flow of pedestrians. (J.A. 33-36). Mrs. Daly encountered a car, parked parallel to the north-south axis of the alley, directly in her path (J.A. 35); stepping ahead of Mr. Lawrence, who had been abreast of her to her right (J.A. 28), she bore to her left (J.A. 55) between the car and the west wall of the service station (J.A. 28) to avoid the approaching traffic to the right (J.A. 58). She took several steps (J.A. 28, 56), fell into the stairwell (J.A. 28), and injured her right ankle. She was taken to George Washington University Hospital by Mr. Lawrence (J.A. 29), was treated there by Dr. Peterson for a tri-malleolar fracture of her right ankle. (J.A. 18). She remained in a cast until September, 1958, suffered pain, and retains today a condition of post-traumatic disability. (J.A. 29-31).

Statement of Proceedings Below

Plaintiff, Virginia Warren Daly, filed a Complaint for damages for personal injury in July, 1959 against all defendants herein — defendants Toomey, Sinclair Refining Company and Muldrow — alleging that "defendants, or one or more of them," had negligently maintained an unlighted, unguarded stairwell by which she had been injured. In addition to various preliminary motions, co-defendants cross-claimed against one another for indemnity or contribution. The case was tried to a jury beginning November, 1962, prior to which all parties stipulated that "the court determine the issues raised by the respective cross-claims." (Finding of Fact No. 1 of Pine, J., of January 29, 1963).

On trial, plaintiff testified that the stairwell into which she fell and its immediate vicinity to be in darkness. (J.A. 28). Her escort, Mr. Lawrence, testified that, during their procession down the alley, "there was no shortage of light." (J.A. 72). Extensive testimony was offered with respect to the condition of illumination in the alley (J.A. 46, 47, 77, 78), and the presence or absence of parked cars along its eastern side.

(J.A. 41, 67, 68). Plaintiff admitted that, at a point on her passage between the car and the building she became unable to see immediately before her because of the darkness, but that she nevertheless proceeded a step or two and then fell. (J.A. 62, 63). She also testified, however, that the car she was circumnavigating was parked "right beside" and very nearly opposite the stairwell into which she fell (J.A. 57), approximately at the edge of the north wall of the building. (J.A. 28). Mr. Toomey testified that the western boundary of his property was a straight perpendicular from "the western extremity of those ascending steps" to V Street (J.A. 109); another witness testified that he "'assumed' the property line coincided with the corrugated iron grating over the drain" although required to dog-leg to encompass the stairwell. (J.A. 102). Mr. Toomey himself, however, admitted that "a portion of what appears to be here the paved alleyway, is in fact the Sinclair, rather, the Toomey property." (J.A. 109). An examination of Plaintiff's Exhibit 2A discloses that the approach to the stairwell from the north is paved identically with the remainder of the alley, being that area necessarily traversed by Mrs. Daly while passing to the left of a parked car "right beside" the north wall of the station. Mrs. Daly testified she was "walking down the alley." (J.A. 27). Other witnesses, who had been walking several feet behind Mrs. Daly and Mr. Lawrence (J.A. 41) were unable to discern the public alley from the gas station property. (J.A. 42, 49-50).

A witness, employed as real estate manager by defendant Sinclair, and who negotiated the Toomey-Sinclair lease in 1956 (J.A. 100), testified that the 1956 lease was a renewal of a rental of the same property under a 1951 lease (J.A. 100); that prior to execution of the 1956 lease, the witness had inspected the property (J.A. 101) and had included a list of repairs to be made by the lessors as a term of the lease agreement (J.A. 100), none of which affected the stairwell or paving on the surface of the leased property. (J.A. 103). He also testified that Sinclair had

made no request for consent to make "structural changes" in the premises during the term of the lease (J.A. 107), which, by paragraph 7 of the lease, they were required to obtain (Plaintiff's Exhibit 7), nor did they, in fact, make any such changes. (J.A. 107). No alteration in the paving of the gas station surface had been made from September, 1956 to the date of trial. (J.A. 108). Mr. Toomey testified as to his knowledge of the condition of the stairwell from his frequent visits to the property. (J.A. 110). Although he conceded an obligation to make some repairs as an owner (J.A. 112), those which were not "structural," e.g., the stairwell (J.A. 112), were not among them. (J.A. 113). Mr. Muldrow by his own admission, was the occupant of the premises (Plaintiff's Exhibit 6, J.A. 89), had no knowledge of the location of the boundary between his premises and the public alley to the west (J.A. 91), and made no repairs himself to, nor requested Sinclair or the Toomeys to repair, the stairwell (J.A. 98), although he had knowledge of its condition. (J.A. 97). Counsel for the defendant Sinclair made an offer to prove that the defendants Toomey had, subsequent to the accident, installed a railing about the stairwell (J.A. 114), which the court rejected (J.A. 114); an offer to prove a D. C. traffic regulation prohibiting parking in public alleys (J.A. 120) was similarly rejected. (J.A. 120). Motions for directed verdicts for each defendant were denied. (J.A. 121).

The court instructed the jury seriatim as to causation (J.A. 138), negligence (J.A. 129), contributory negligence (J.A. 133), and as to their duty to weigh the conflicting evidence to determine the facts. (J.A. 132). He also instructed as follows:

"While there are three defendants in this action, it does not follow that if one is liable the others are liable. Each is entitled to a consideration of his own defense separately . . ." (J.A. 129).

". . . plaintiff claims that each and all of the defendants were negligent in maintaining an unlighted stairwell under circumstances reasonably requiring lighting, in maintaining an unguarded stairwell, in maintaining an uncovered

stairwell, and in maintaining a stairwell without warning signs. Each of the defendants denies that he or it was negligent in any of these respects or otherwise. . . ." (J.A. 130).

" . . . both a trespasser and a bare licensee must take the premises as he finds them. (There is) an exception to this general rule of law, which raises an issue of fact for your determination Where property is adjacent to a public highway . . . and the occupant of the property maintains an excavation thereon, and also maintains a situation or condition where a reasonably prudent man might mistake the point where the highway ended and the private property began, the occupant of the property has a duty to take reasonable precautions to protect persons against falling into the excavation." (J.A. 131).

"I have used the word 'occupant' in explaining this principle of law. But when this condition of the property has remained unchanged and was the same at the time of the accident as it was at the beginning of the term of the lease, and there is no dispute in this case from the evidence on this point, this principle of law, and the duty imposed thereunder, applies to the owner and intermediary lessor as well as to the occupant or tenant. . . ." (J.A. 131).

"However, if you should find . . . that reasonably adequate safeguards were provided by artificial lighting, and conclude that these safeguards were nullified by a failure to cause the lighting fixtures . . . to be lighted on the occasion in question, defendants Toomey and Sinclair Refining Company would not be responsible, because control of the lighting fixtures was in the hands of the defendant Muldrow" (J.A. 132).

The jury retired at 3:37 p.m., December 3, 1962, and were excused at 6:04 p.m. until the following morning. (J.A. 136). On December 4, the jury deliberated until 4:49 p.m., at which time the Court recalled the jury of its own motion and gave the Allen Charge. (J.A. 136 i, j). The jury retired immediately, and returned about twenty minutes later with a verdict for plaintiff against defendant Sinclair Refining Company, but for both other defendants. (J.A. 136 k). On the ground that the verdict

was inconsistent with the instructions (J.A. 136 k), the Court reinstated the jury that a finding against either defendants Toomey or Sinclair must necessarily be against all three defendants. (J.A. 136 m, n). The jury retired at 5:20 p.m., December 4; at 11:05 p.m., in response to the Court's inquiry, the foreman stated he thought a unanimous verdict still possible. (J.A. 136 p). The Court then excused the jury for the night, and at 12:30 p.m. the following afternoon, December 5, the jury returned a verdict for plaintiff against all defendants in an amount of Seventeen Thousand Dollars (\$17,000.00). (J.A. 136 l). Defendants' motions for judgment n.o.v. were denied; motions for a new trial were granted, with a proviso that if plaintiff file a remittitur of Five Thousand Dollars (\$5,000.00), the motions would be denied. From entry of judgment for plaintiff for Twelve Thousand Dollars (\$12,000.00), these defendants appeal.

SUMMARY OF ARGUMENT

1. A possessor of land who negligently maintains a dangerous condition thereon is liable to a person injured thereby who comes upon the land at the implied invitation extended by the possessor in maintaining the illusion of the continuation of a public highway upon which that person reasonably believes himself to be. The defendants Toomey, Sinclair and Muldrow, being owner-lessor, lessee, and sub-lessee, respectively, stipulated to try the issues of their right to indemnity or contribution inter se to the Court. The Court, therefore, properly excluded prejudicial evidence of control of the premises and instructed the jury to find for or against the defendants as an entity, because, as against plaintiff, all defendants were "possessors," there being sufficient evidence upon which a jury could reasonably find any one or more defendants in control of the premises for the purpose of repairing the dangerous condition.

2. The jury's function being to assess the credibility of witnesses and to weigh their evidence, conflicting testimony as to the condition of illumination of the alley in the vicinity of the stairwell should be considered by the jury. The rule requiring that the Court direct a verdict for defendant when plaintiff's witnesses disagree is applicable, if at all, only when their disagreement is as to the cause of an injury for which plaintiff seeks to hold defendant liable by invoking the doctrine of res ipsa loquitur. Therefore, the Court herein properly permitted the jury to decide whether defendants' stairwell had negligently been maintained in a dangerously unlighted condition, and whether plaintiff was contributorily negligent in proceeding in an alley which, for her, was in a state of darkness because plaintiff offered proof of both specific negligence and the cause of her injury.

3. Although violation of parking regulations may be negligence per se, the wrongfulness of the conduct of unknown third persons who are not parties to the case at bar is irrelevant, although the conduct itself may be relevant to the question of causation. Therefore, the trial Court properly excluded evidence of a traffic regulation prohibiting parking in alleys, although admitting evidence of the presence of parked vehicles, because the wrongfulness of such parking would be material only in an action by the present defendants to recover against the owners of the vehicles.

4. Declaring a mistrial, discharging the jury and awarding a new trial for misconduct of the jury are matters within the discretion of the trial judge. The trial Court herein instructed the jury to find for or against defendants as an entity with respect to the condition of the stairwell, and the jury returned a verdict repugnant thereto by finding for plaintiff against one defendant only. Therefore, the trial Court properly rejected the initial verdict, gave clarifying instructions, and submitted the cause for further deliberation, because the practice is well established, less wasteful than mistrial, and entirely discretionary when

employed to correct a technically defective verdict rather than to force substantive change in a verdict which is consistent with the charge.

5. Motions for new trial based upon the excessiveness of a verdict for a claimant are within the discretionary power of the trial Court, except insofar as the verdict is excessive as a matter of law. The trial Court properly denied defendants' motions for a new trial when plaintiff remitted Five Thousand Dollars (\$5,000.00) of a verdict for Seventeen Thousand Dollars (\$17,000.00) because it is the universal practice of Federal trial courts to avert the economic waste of a new trial on the ground of an excessive verdict alone by the device of remittitur, reducing a verdict excessive as a matter of law to an amount within the discretionary power of the trial Court to approve.

ARGUMENT

- I. THE TRIAL COURT PROPERLY INSTRUCTED THE JURY THAT A FINDING BASED UPON THE CONDITION OF THE STAIRWELL MUST BE IDENTICAL AS TO ALL DEFENDANTS AND PROPERLY EXCLUDED EVIDENCE OF SUBSEQUENT REPAIRS TO THE STAIRWELL, BECAUSE THE ISSUE OF CONTROL OF THE PREMISES AMONG DEFENDANTS INTER SE WAS RESERVED FOR THE COURT BY THE STIPULATION TO TRY THE CROSS-CLAIMS FOR INDEMNITY OR CONTRIBUTION TO THE COURT WITHOUT A JURY.

The Court instructed the jury that trespassers and bare licensees upon private property take the risk of harm from condition thereon as they find them. It then instructed in accordance with a generally-recognized exception to that rule imposing liability upon a possessor of land to travelers upon an adjacent public highway if the possessor is responsible for an illusion of the continuation of the highway upon his premises and negligently maintains a condition upon his premises which endangers travelers who are reasonably misled on to the illusory highway. Although the exception has not yet been expressly declared the law of the District of Columbia, it is of such universal acceptance that it is incorporated in the Restatement of the Law of Torts, Sec. 367.

Dean Prosser states it to be the law as applied in eleven (11) cases representative of nine (9) jurisdictions having considered the situation. Prosser, Law of Torts, pp. 428 et seq. It is stated as the rule in 25 Am. Jur., "Highways," Sec. 530, and in 65 C.J.S., "Negligence," Sec. 78. It appears to be the law of Maryland, Weidman v. Consolidated Gas, Electric Light & Power Co., 158 Md. 39, 148 A. 270 (1929) (dicta); Cf. Murray v. McShane, 52 Md. 217, 36 Am. Rep. 367 (1879). United States Courts of Appeal for the Fifth and Tenth Circuits have approved the principle in Louisville & N. R. Co. v. Anderson (5th Cir., 1930), 39 F.2d 403, and Concho Construction Co. v. Oklahoma Natural Gas Co., (10th Cir., 1953), 201 F.2d 673, respectively. Leading state decisions, both holding occupants of private property liable for injuries to straying travelers caused by negligently protected excavations, are Beck v. Carter, 68 N.Y. 283 (1877), and Crogan v. Schiele, 53 Conn. 186, 1 Atl. 899 (1885). The rule is predicated upon the principle of implied invitation in the illusion of the continuation of the public highway upon what is, in fact, private property; it therefore imposes a duty upon the occupant comparable to that he owes his express invitees. Altemus v. Talmadge, 61 App. D.C. 148, 58 F.2d 874 (1932); Louisville & N. R. Co. v. Anderson, supra. Since it is not an unreasonably burdensome obligation and has received substantial acceptance elsewhere without any apparent dissent, appellee urges this Court to approve the rule expressly at the law of the District of Columbia.

Upon the authority of Section 367 of the Restatement of the Law of Torts, and the cases cited above, and not upon Section 368, as both appellants Sinclair and Toomey suggest, the trial Court based its instruction with respect to the duty of an occupant to a mistakenly straying traveler. (Opinion of Pine, J., p. 4, n. 2). Restatement, Sec. 367, declares that

A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway, is subject to

liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel.

The rule of the Restatement, Sec. 367, does not depend upon a finding that the condition complained of constituted a nuisance before injuries caused thereby create liability. None of the supporting cases require that the dangerous conditions held therein to impose a duty to travelers be equivalent to a common law nuisance. Nor do those authorities contemplate an injury to the traveler who is, in fact, upon the public highway when he encounters an extra-territorial effect of a condition originating upon the private property, or who accidentally, i.e., involuntarily, departs from the highway, insofar as liability to the traveler is concerned. Nor do they depend upon the chronology of construction of the public highway and the dangerous condition. As the Comment to Sec. 367 explains, the traveler within the ambit of that section is entitled to such protection from the occupant of the privately-owned land as he had earlier received from the municipality before being enticed from the public highway, both occupant and city being obliged to maintain their respective thoroughfares in a reasonably safe condition.

Louisville & N. R. Co. v. Anderson, supra; Smith v. District of Columbia, 89 App. D.C. 7, 189 F.2d 671 (1957). On the basis of the evidence with respect to an absence of demarcation of the boundary between the public alley and the private property, and the proximity of that condition to the stairwell, the jury could and did reasonably find plaintiff misled into a dangerous condition on private property in the belief she was traversing a public alley.

Having correctly instructed the jury as to a possible finding of fact to which Restatement, Sec. 367, would apply, the trial Court attempted to remove from the jury's consideration the issues of the identity of which of the three co-defendants inter se, if any, should be deemed the "possessor" of the property for purposes of the duty imposed

by that section. The parties having stipulated, pursuant to Rule 39(a), F.R.Civ.P., that their respective rights to indemnity or contribution against one another be determined by the Court, "possession" or "occupancy" of the land as a question of fact in dispute between defendants inter se became irrelevant to plaintiff's rights against defendants as joint tortfeasors except insofar as the Court was required to instruct the jury that, as a matter of law, it must find for any one or more of defendants because no reasonable juror could find upon the evidence the "possession" contemplated by Restatement, Sec. 367, in that defendant. Defendants Toomy, in their lease to defendant Sinclair, reserved, by paragraph six thereof, power to veto any "structural changes" proposed by the lessee Sinclair by withholding their written consent. By paragraph 16, however, the lessee Sinclair obtained advance permission in the agreement itself to undertake extensive construction work on the property of "any and all structures, improvements, appliances . . . of whatsoever kind, on, under and above the ground, it may desire to use . . ." By the terms of the sub-lease by defendant Sinclair to the defendant Muldrow, Sinclair reserved to itself a right of entry for inspection (paragraph 19), and exacted a promise from Muldrow to obtain its written consent to all "alterations or changes in or additions to any buildings, structures or improvements . . ." (paragraph 20). However, by paragraph 9, Sinclair required Muldrow to "maintain in good condition and repair the driveways, approaches and sidewalks adjacent" to the premises. Therefore, by their agreements with one another the co-defendants appear to have reserved to themselves such control over the subject of repairs to the property that a jury might reasonably find any one or more of them to have at least the "possession" necessary for knowledge of dangerous conditions and the power to remedy them envisioned by the rule of Restatement, Sec. 367. The Court correctly states that an obligation to third persons of the "possessor" to repair premises in his "possession" cannot be vitiated by the expedient of failing to request permission to do so as required in his agreement

with his lessor. (Opinion of Pine, J., p. 6). Strange v. Bodcaw Lumber Co., 79 Ark. 490, 96 S.W. 152 (1906). The authorities establish that a landowner who retains such control over premises he leases to another as to permit him to repair conditions endangering travelers on adjacent public ways without trespassing against his tenant may not insulate himself from liability to travelers injured thereby by imposing a duty of repair upon the lessee. Security Savings & Commercial Bank, et al. v. Sullivan, 49 App. D.C. 119, 261 Fed. 461 (1919); Altemus v. Talmadge, supra. Similarly a tenant in exclusive possession and control insulates his lessor from liability to third persons. Bowles v. Mahoney, 91 U.S. App. D.C. 155, 202 F.2d 320 (1952), cert. denied, 344 U.S. 935 (1953). Lawler v. Capital City Life Insurance Co., Inc., 62 App. D.C. 391, 68 F.2d 438 (1933); Bixby v. Thurber, 80 N.H. 411, 118 A. 99 (1922). And landlord and tenant may be held jointly liable when both are in control of conditions negligently allowed to remain in a state of disrepair. Golden v. New York, ___ Misc. ___, 101 N.Y.S. 2d 588 (1950); Nadeau v. Roeder, 139 Wash. 648, 247 P. 951 (1922). Consequently the trial Court correctly instructed the jury that all defendants were to be held responsible for the condition of the stairwell, being for the jury's purposes, jointly liable or not at all; indeed, it would have been error to instruct otherwise in view of the stipulation. The right to indemnity depends upon a finding of primary liability in the indemnitor which the indemnitee has discharged. Washington Gas Light Co. v. District of Columbia, 161 U.S. 316, 40 L. Ed. 712 (1896). The right to contribution depends upon a finding of liability in a joint tortfeasor. George's Radio, Inc. v. Capital Transit Co., 75 U.S. App. D.C. 187, 126 F.2d 219 (1942). In the instant case, a finding that any one of defendants was in control of the stairwell for purposes of the application of Restatement, Sec. 367, and thus liable to plaintiff, would raise the issue of that defendant's right to indemnity or contribution from his co-defendants, issues reserved to the Court by the stipulation. The issue properly put to the jury was whether the stairwell had, in fact, been negligently allowed to remain in a dangerous

condition, since such a finding imposed liability upon at least some one of defendants, thus raising the issue of a right to indemnity or contribution.

Upon the same ground the trial Court properly rejected defendant Sinclair's offer of proof of subsequent repairs to the stairwell by defendants Toomey. Evidence of subsequent repairs to an allegedly negligent condition is not competent to prove negligence, because future precautions cannot be deemed an admission of past misconduct, although the suggestion is likely to prejudice the jury against a defendant who repairs. Walker v. Dante, 61 App. D.C. 175, 58 F.2d 1076 (1932). Admission of evidence of both probative value and prejudicial effect is largely within the discretion of the trial judge. Myers v. Blackman, 130 A.2d 590 (D.C. Mun. App., 1957). Since the jury had before it both Plaintiff's Exhibits 6 and 7, and testimony tending to prove some control of the premises in Sinclair, evidence of similar control in defendants Toomey would not have been sufficient to nullify the inference of Sinclair's control as a matter of law. Therefore, the trial Court excluded the evidence as being prejudicial to the co-defendants Toomey and Muldrow while having no probative value whatsoever, the issue of control of the premises having been saved for the Court. (Opinion of Pine, J., J.A. 152).

II. THE TRIAL COURT PROPERLY SUBMITTED THE ISSUES OF DEFENDANTS' NEGLIGENCE AND PLAINTIFF'S CONTRIBUTORY NEGLIGENCE TO THE JURY BECAUSE CONFLICTING EVIDENCE UPON WHICH DIVERGENT INFERENCES AMONG REASONABLE JURORS ARE POSSIBLE PRESENTS A QUESTION OF FACT FOR THE JURY.

It is fundamental that when there is uncertainty as to the existence of either negligence or contributory negligence, arising either from conflicting testimony or a multiplicity of possible conclusions therefrom, the issues are properly resolved by the jury. Richmond & Danville Railroad Co. v. Powers, 149 U.S. 43, 37 L. Ed. 642 (1893); Gunning v.

Cooley, 281 U.S. 90, 74 L. Ed. 720 (1930); Balto. & Ohio R. Co. v. Postom, 85 U.S. App. D.C. 207, 177 F.2d 53 (1949). Upon motions for directed verdicts for defendants, the trial Court must assume that the evidence for the plaintiff proves all that it may reasonably be found sufficient to establish and draws all favorable inferences therefrom, denying the motion if it finds "substantial evidence" in the record to support a verdict for plaintiff. Gunning v. Cooley, supra; Balto. & Ohio R. Co. v. Postom, supra. This Court has said, per Holtzoff, J., sitting by designation,

"Substantial evidence is evidence of such quality and weight as would be sufficient to justify a reasonable man in drawing the inference of fact that is sought to be sustained. If substantial evidence is presented, which, if credited, would sustain a verdict in favor of one party or the other, the case should be left to the jury From the mere fact that the evidence permits two or more possible inferences, it does not necessarily follow that the evidence is not substantial and is not sufficient to sustain the jury's finding. To be substantial, the evidence need not point entirely in one direction." B. & O. R. Co. v. Postom, 85 U.S. App. D.C., pp. 208-209 (affirming judgment upon a verdict for plaintiff).

It is urged by appellants Sinclair and Muldrow that plaintiff's witnesses having contradicted one another with respect to the degree of illumination in the vicinity of the stairwell, plaintiff has thereby proved two "inconsistent" theories and is thus unable to recover from either. The authorities cited by appellants are superious. All three cases cited by appellant Sinclair,¹ and the single case cited by appellant Muldrow² arose in the context of a claim based upon res ipsa loquitur in which plaintiff's evidence, permitting an inference of a proximate cause of

¹ Taylor v. Crane Rental Co., 103 U.S. App. D.C. 13, 254 F.2d 351 (1958); Washington Marlboro & Annapolis Motor Lines v. Maske, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951); Brown v. Capital Transit Co., 75 U.S. App. D.C. 337, 127 F.2d 329 (1942).

² Selby v. S. Kann & Sons Co., 64 App. D.C. 36, 73 F.2d 853 (1934).

his injuries not within defendant's exclusive control, was, indeed, "inconsistent" with plaintiff's right of recovery. In the instant case plaintiff offered proof of specific negligence of each defendant in the maintenance of an unguarded and unlighted stairwell, endangering a plaintiff entitled to protection, and which was the proximate cause of that plaintiff's injuries. The trial Court expressly remarked in its charge that the evidence with respect to the illumination in the alley was in conflict, and that the jury must weigh the evidence to determine as a fact whether the defendants had taken reasonable precautions in protecting ordinarily prudent persons from injury in falling into the stairwell, considering inter alia the factor of lighting. The credibility of witnesses is a matter indisputably within the province of the jury. Balto. & Ohio R. Co. v. Postom, supra, 85 U.S. App. D.C. at p. 210. Surely appellants do not suggest here that plaintiff, by calling a witness, thereby admits all assertions unfavorable to her made by that witness on cross-examination. The jury, in addition to its prerogative to disbelieve Mr. Lawrence, who testified as to "no shortage of light" and to give credence to Mrs. Daly, who said the alley about the stairwell was dark, might reasonably have found also that (a) Mr. Lawrence's observation of the light was from a different geographic point and, thus, subject to different conditions of shadow and beam projection; (b) Mr. Lawrence spoke of mechanical lighting equipment rather than degree of illumination; (c) Mrs. Daly's eyes adapted to optimum "night vision," upon an abrupt change from a bright to a dark environment, more slowly than Mr. Lawrence's eyes, and that Lawrence spoke only of a relative degree of visibility rather than as to an absolute physical fact. The Court, therefore, left the issue of the alley lighting to the jury as a matter of evidentiary weight and credibility. Conflicting evidence does not justify withdrawal from the jury on the theory that the proof gives equal support to inconsistent and uncertain inferences. Schulz v. Pennsylvania R. Co., 350 U.S. 523, 100 L. Ed. 668 (1956).

All three appellants point to the alleged contradiction in testimony regarding the condition of lighting within the alley and contend that, upon either theory, Mrs. Daly must be held to have been herself negligent as a matter of law. It is axiomatic that a trial Court may direct a verdict for a defendant only when "no reasonable man could reach a verdict in favor of plaintiff." Tobin v. Penna. R. Co., 69 App. D.C. 262, 263; 100 F.2d 435, 436 (1938). In actions by pedestrian injured in falls allegedly caused by defendants' failure to repair dangerous conditions for which they were responsible, this Court has uniformly held plaintiff's contributory negligence to be a jury question. Altemus v. Talmadge, supra (traveler sued owner and city jointly for fall caused by hole in both private and public portions of sidewalk pavement which pedestrian may have noticed on prior occasions); Young Men's Shop v. Odend'hal, 73 App. D.C. 354, 121 F.2d 857 (1941) (invitee sued occupant for fall at "dimly lighted or dark" and dangerous entrance which defendant, although perceiving the darkness, nevertheless proceeded through "before ascertaining the character of the place ahead." 73 App. D.C., p. 356, 121 F.2d, p. 859); Walker v. Dante, supra (invitee sued owner-lessor of leased premises for fall over ledge in passageway between two stores while plaintiff was distracted by show window display, admitting that she "didn't look," and "just walked in there, tripped, and fell." 61 App. D.C., pp. 176-177). Other jurisdictions observe the same practice. Wabash v. Bruso, 186 Ind. 637, 117 N.E. 867 (1917); Hall v. Manson, 99 Iowa 698, 68 N.W. 922 (1896).

In Caddo Electric Cooperative, Inc. v. Bollinger (Okla. Sup. Ct.), 285 P.2d 200, 55 A.L.R. 2d 172 (1955), the Court affirmed judgment upon a verdict for a plaintiff who collided with a guy wire maintained by defendant across a public right-of-way, saying,

"It is recognized generally, that one traveling upon a highway is entitled to assume his way is reasonably safe. And, although any person is required to use reasonable care and caution for his own safety,

he is neither required nor expected to search for obstructions or dangers." 55 A.L.R. 2d, p. 176.

In Louisville & N. R. Co. v. Anderson, supra, the Court said

"(i)f plaintiff was justifiably misled by an appearance of a continuance of (the) . . . street, negligently created by the defendant, his status while on defendant's land was not that of a licensee or trespasser, but that of a traveler on a highway, as against defendant." 39 F.2d, p. 405.

The jury could, from the testimony of all witnesses as to ignorance of the location of the boundary between the gas station and the public alley, and from an examination of plaintiff's photographic evidence, reasonably have found that plaintiff reasonably believed herself to be on the public way, and thereafter exercised due care, notwithstanding the condition of illumination. The jury could infer that plaintiff, in bearing to her left, chose the least dangerous course in averting more immediate harm from vehicles to her right; or relied upon her observation of the safe passage of pedestrians ahead of her over the same terrain; or relied upon the duty of careful maintenance owed by a municipality to travelers upon its highways. Any such inference would support a finding that plaintiff exercised due care under the circumstances for her own safety. Therefore, the issue was properly committed to the jury, as this Court must so hold, since it is fundamental that a general verdict is deemed on appeal to have decided all issues favorably to the prevailing party.

Dickens v. International Brotherhood of Teamsters, Chauffeurs, Warehousemen, & Helpers, 84 U.S. App. D.C. 51, 171 F.2d 21 (1948).

III. THE TRIAL COURT PROPERLY EXCLUDED EVIDENCE OF VIOLATION OF A TRAFFIC REGULATION BY THIRD PERSONS NOT PARTIES TO THE ACTION BECAUSE THE WRONGFULNESS OF THEIR CONDUCT IS IRRELEVANT TO DEFENDANTS' LIABILITY TO PLAINTIFF.

Appellants Toomey assign as error the trial Court's refusal to allow Toomeys to introduce evidence of a D. C. traffic regulation prohibiting parking of motor vehicles in public alleys, declaring the purpose of the offer to be proof that cars parked in the alley, and not the condition of the stairwell or inadequate lighting, were the sole proximate cause of plaintiff's injuries. The trial Court, however, instructed extensively on the meaning of "proximate cause" (J.A. 128) and its indispensability to an actionable claim for negligence (J.A. 135), and the issue of causation, including the presence of cars in the alley as a possible sole cause of plaintiff's injury, was before the jury. Whether the cars were parked unlawfully, and whether violation of the traffic regulations was negligence per se, would be relevant only to a claim by defendants here for indemnity or contribution against unknown third persons not parties herein, the owners or drivers of the cars so parked. The authorities cited by appellants Toomey are not to the contrary, since all involve the introduction of traffic regulations as evidence of the wrongfulness of the conduct of the defendant from whom a plaintiff sought recovery in the action against that defendant.

IV. THE TRIAL COURT PROPERLY REJECTED THE INITIAL VERDICT FOR PLAINTIFF AGAINST DEFENDANT SINCLAIR ONLY, REINSTRUCTED THE JURY, AND RESUBMITTED THE CASE FOR FURTHER DELIBERATION, BECAUSE SUCH A PROCEDURE FOR CORRECTING AN IMPROPER VERDICT CONSTITUTES A SOUND EXERCISE OF DISCRETION BY THE TRIAL COURT.

All three appellants take issue with the trial Court's disposition of the initial verdict, finding only defendant Sinclair liable to plaintiff, and for both other defendants against plaintiff, determined by the Court to be inconsistent with its original charge. Having instructed the jury that the duty imposed upon an "occupant" by the Restatement, Sec. 367,

applied as well to owner and intermediary lessor under the circumstances of the instant case, the Court correctly found a verdict against one defendant repugnant to the instruction but elected to give clarifying instructions and permit further deliberation. Appellants argue, in substance, that the Court had no alternative but to declare a mistrial, any other procedure being productive only of a "coerced" verdict.

This Court has consistently ruled that disposition of a motion for new trial based upon impropriety of the jury's deliberations rests with the sound discretion of the Court. In Lansburgh & Bros., Inc. v. Clark, 75 U.S. App. D.C. 339, 127 F.2d 331 (1942), the Court affirmed judgment for a husband, rendered upon a verdict against his wife and for him in an action by both against defendant for injuries to the wife. Although the verdicts imparted irreconcilable conflict as to findings of fact, and the jury "either mistakenly or arbitrarily failed to perform their duty," the Court held denial of defendant's motion for new trial in the husband's case was not an abuse of discretion. 75 U.S. App. D.C., p. 341. Accord, Washington Times Co. v. Bonner, 66 App. D.C. 280, 86 F.2d 836 (1937); Hoagland v. Chestnut Farms Dairy, 63 App. D.C. 357, 72 F.2d 729 (1934). Moreover, when the jury's misconduct is of such magnitude that to disregard it would constitute an abuse of discretion, this Court has expressly approved the practice of reinstruction and redeliberation in preference to declaration of a mistrial. Bruce v. Chestnut Farms-Chevy Chase Dairy, 75 U.S. App. D.C. 192, p. 193, 126 F.2d 224, p. 225 (1942) (jurors dissenting from general verdict when polled). The practice is applicable to misconduct of the jury manifested in a general verdict which reflects disregard of the trial Court's instructions, according to 53 Am. Jr., "Trial," Sec. 1099, pp. 762, n. 20, in 15 American jurisdictions, including Maryland. (Gaither v. Wilmer, 71 Md. 361, 18 A. 590, 1889). It has recently been approved by the Eighth Circuit in Fireman's Insurance Co. of Newark, N. J., Inc., v. Craigie (8th Cir., 1962), 298 F.2d 457, affirming judgment for plaintiff, entered upon a second verdict returned after redeliberation, when the

trial judge refused to accept an erroneous first verdict and reinstated. Cf. Myrtle v. Checker Taxi Co. (7th Cir., 1960), 279 F.2d 930. And the lower courts in the District of Columbia have advocated the practice of reinstruction and redeliberation when initial jury verdicts evince confusion as to the intricacies of joint liability. Grober v. Capital Transit Co. (D.C. D.C., 1954), 119 F. Supp. 100; Greet v. Otis Elevator Co. (D.C. App., 1963), 187 A.2d 896. Its obvious practicality in preventing the economic waste of mistrial, as noted by the trial Court herein (Opinion of Pine, J., J.A. 152), commend its express approval by this Court, and, indeed, would appear to follow directly from the limited practice of correction as to form approved in Market Co. v. Claggett, 19 App. D.C. 12 (1901).

Appellants suggest that the instructions and reinstruction, taken together, are prejudicial in various respects, extracting various passages from context to establish that the initial verdict against Sinclair was consistent with the original instructions; inconsistent with the original instructions but importing a factual finding so favorable to defendants Toomey and Muldrow as to exonerate all three; and that the instructions were calculated to force a defiant jury to a verdict against all three defendants against their will. An examination of the charge — original and supplementary — in its entirety discloses it to be fair to all parties concerned, that the verdict conforms to the evidence and the law as given, and that the parties and the Court not be needlessly put to the expense of a new trial. Appellants' real grievance is with the practice of the Allen Charge itself, which remains the approved method of insuring that a jury not be unnecessarily deadlocked by mistaking obstinacy for the principle of unanimity. Allen v. U. S., 164 U.S. 492, 41 L. Ed. 528 (1896). This Court has frequently reiterated its ruling that the charge to the jury must be considered as a whole in considering its impact upon the jury. Hecht Co. v. Jacobsen, 86 U.S. App. D.C. 81, 180 F.2d 13 (1950); Cohen v. Evening Star Newspaper Co., 72 App. D.C.

258, 113 F.2d 523 (1940); Washington Gas Light Co. v. Poore, 3 App. D.C. 127 (1894). The Court has, moreover, held that a subsequent instruction may cure the defect in a prior ambiguous or even incorrect instruction. Danzansky v. Zimbelist, 70 App. D.C. 234, 105 F.2d 457 (1939); Capital Traction Co. v. Wathen, 35 App. D.C. 577 (1910). And the Court has held proper a refusal of the trial Court to give an instruction repetitive of those already given. Lippman v. Williams, 79 U.S. App. D.C. 334, 147 F.2d 150 (1945). In the instant case the trial Court gave complete instructions on all issues. After nearly a full day of deliberation, the Court gave the Allen Charge, and the jury returned almost immediately with the verdict for plaintiff against defendant Sinclair alone. Whatever the jury's process of logic, it is clear that someone was considered to have been negligently responsible for Mrs. Daly's injuries. Whether the trial Court's original charge merely under-emphasized the joint responsibility of defendants for the stairwell or was genuinely ambiguous, the verdict evinced the jury's confusion which the trial Court promptly sought to dispel by a reinstruction, grounded upon the fair assumption that the jury considered some defendant or defendants liable to plaintiff, and reasonably calculated to assist it in deciding which ones. The Court was not asked, nor did it volunteer, to repeat its extensive instructions with respect to negligence and causation, of which the jury gave no indication of misunderstanding. Therefore, nearly six hours later, no verdict having been returned, the Court reassembled the jury and inquired of the foreman whether he believed a unanimous verdict yet possible. The foreman answered affirmatively; deliberations resumed, and resulted several hours still later in the verdict for plaintiff for Seventeen Thousand Dollars (\$17,000.00) against all defendants. The very protraction of deliberations indicates that the jurors themselves did not regard themselves "coerced" into a verdict for any party. Appellee submits that such a conclusion must result from a reading of the proceedings in their entirety after submission of the cause to the jury.

V. THE TRIAL COURT PROPERLY DENIED DEFENDANTS' MOTION FOR A NEW TRIAL UPON PLAINTIFF'S REMITTITURE OF THE AMOUNT OF THE VERDICT IN EXCESS OF THAT IT DEEMED SUSTAINED BY THE EVIDENCE, BECAUSE REMISSION OF THE EXCESSIVE PORTION OF THE VERDICT REDUCES THE VERDICT TO A SUM WITHIN THE LIMITS OF THE DISCRETIONARY POWER OF THE TRIAL COURT TO APPROVE UPON A MOTION FOR NEW TRIAL.

Appellant Muldrow assigns the conditional granting of a new trial upon plaintiff's failure to remit all in excess of Twelve Thousand Dollars (\$12,000.00) as error, because the practice of remittitur is not the law of the District of Columbia in cases in which damages are unliquidated. The implications from the few cases within the jurisdiction in which the practice of remittitur has been considered on appeal appear to the contrary. In Munsey v. Safeway Stores (D.C. Mun. App., 1949), 65 A.2d 598, appellant's principle authority, the Court affirmed an order of the trial Court in granting a new trial and refused to correct an earlier verdict for plaintiff by remittitur, disproving the practice only as employed by an appellate Court. The Court expressly held that a motion for new trial based upon the excessiveness of the verdict rested exclusively within the discretion of the trial Court. 65 A.2d, p. 600. Moreover, the premise of its disapproval, viz., absence of approval by other Federal jurisdictions, is ill-founded, since at least two United States Courts of Appeal have expressly approved remittitur as ordered by appellate Courts in actions for unliquidated damages. Bucher v. Krause (7th Cir., 1953), 200 F.2d 576, cert. denied, 345 U.S. 997, 97 L. Ed. 1404, rehearing denied, 346 U.S. 842, 98 L. Ed. 362 (assault). Texas Co. v. Christian (5th Cir., 1949), 117 F.2d 759 (constructive eviction). It is presently the practice of this Court, upon the authority of the District of Columbia Code (1961 Ed.), Sec. 16-120, to order directly reductions in "excessive" verdicts for wrongful death without remand to the trial Court. And there is a possibility that the Municipal Court itself will not follow the Munsey case today. See Fred Drew Construction Co. v. Mire, et al. (D.C. Mun. App., 1952), 89 A.2d 634 (negligent property damage by adjoining landowner).

Insofar as the practice of remittitur is employed by Federal trial Courts, its approval appears to be universal, even in tort actions when damages are unliquidated. Dimick v. Scheidt, 293 U.S. 474, 79 L. Ed. 603 (1935) (dictum); Matanuska Valley Lines v. Neal, et al. (9th Cir., 1957), 255 F.2d 632. See 6 Moore, Federal Practice (2nd Ed.), Sec. 59.05 (3), pp. 3737-3752, p. 3739, n. 8; supp. pp. 118-119. (See cases cited at 39 Am. Jur., "New Trial," Sec. 210, n. 8, and Sec. 215, n. 1, for the practice in state courts.) Indeed, it seems to be mandatory that the trial courts in the District of Columbia grant new trials as conditional upon a failure of remission of the excess when the verdict is excessive as a matter of law. Brooks Transportation Co. v. McCutcheon, 80 U.S. App. D.C. 406, 154 F.2d 841 (1946) (jury verdict exceeded plaintiff's own estimate of value of property damage sustained in collision of motor vehicle); Fred Drew Construction Co. v. Mire, et al., supra. No cogent reason can possibly be advanced for disapproving the practice when the verdict for plaintiff is deemed excessive initially by the trial Court, in its exercise of discretion to grant or deny a new trial, without first having been considered by the Court of Appeals. Although remittitur is subject to the theoretical problem appellant notes in the determination of the proper amount of remission to be required, the problem has been resolved by this Court, according to Prof. Moore, by requiring remission only of the amount in excess of the highest reasonable jury verdict, Boyle v. Bond, 88 App. D.C. 178, 187 F.2d 362 (1951); 6 Moore, Federal Practice (2nd Ed.) Sec. 59.05(3), p. 3744, n. 28, and appears no longer to be an open question. Moreover, theoretical uncertainty as to a desirable amount of reduction appears a more acceptable alternative than a new trial for all parties, with its attendant risks and costs, merely to indulge one defendant's propensity to gamble on a more favorable jury, when an unimpeachable finding of liability implicit in the first verdict is defective only in the amount of damages awarded and may be cured by the expedient of the remittitur practice.

CONCLUSION

For the foregoing reasons, the judgment entered below should be affirmed in all respects.

Respectfully submitted,

JOHN L. LASKEY

THOMAS S. JACKSON

ROBERT M. GRAY

1025 Connecticut Avenue, N. W.
Washington 6, D. C.

Attorneys for Appellee

MARVIN J. COLES

1000 Connecticut Avenue, N. W.
Washington 6, D.C.

Of Counsel

BRIEF OF APPELLANTS

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,875

574

JAMES C. TOOMEY and JOHN J. TOOMEY,
Trustees under the Will of
Ellen C. Toomey, Deceased,

Appellants,

v.

VIRGINIA WARREN DALY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 20 1963

Nathan J. Paulson
CLERK

HARRY L. RYAN, JR.

815 - 15th Street, N. W.
Washington, D. C.

Attorney for Appellants

(i)

QUESTIONS PRESENTED

1. Where there was evidence adduced by plaintiff-appellee that one or more motor vehicles were parked in a public alley in violation of a pertinent traffic regulation, should defendants-appellants have been precluded by the court from introducing that regulation in evidence, assuming arguendo that its violation created the sole cause for appellee's deviation from her intended course of progress down such alley, and which deviation resulted in her entry upon private property owned by appellants upon which appellee was thereafter injured while so deviating?
2. Assuming that in deviating from her progress down the public alleyway involved in Question 1, above, appellee did so consciously, and without any determination that appellants' private property appeared to be any continuation of the public alley, would appellants be liable for injuries sustained by appellee in falling into a stairwell upon appellants' private property while traversing appellants' property for her own intent and purpose?
3. Assuming the conditions related in both Questions 1 and 2, above, and further that either it was so dark that appellee could not see existing conditions, or alternatively that it was light enough for others to see, would appellee not be barred by contributory negligence from recovering from appellants for injuries sustained while upon their property, and appellants be entitled to the granting of a timely motion for a directed verdict upon such showing?
4. Assuming that the court charged the jury that it was to find for or against each defendant, premised upon whether or not each defendant was responsible for providing what the jury might determine as reasonably adequate lighting to appellants' premises, and that evidence was adduced legally requiring one defendant, Sinclair, to so provide such

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TEXT

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,875

JAMES C. TOOMEY and JOHN J. TOOMEY,
Trustees under the Will of
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Appellants,

v.

VIRGINIA WARREN DALY,

Appellee.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF OF APPELLANTS

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia had jurisdiction of the original action, a suit for personal injuries, pursuant to Title 11-306, District of Columbia Code, 1951 Edition. Final judgment was entered therein in favor of the appellee the 5th day of December, 1962. Timely motion for a new trial or judgment non obstante verdicto was denied, and this appeal was duly noted the 1st day of March,

1963. This court has jurisdiction pursuant to the provisions of Title 28 U.S. Code, Section 1291.

STATEMENT OF THE CASE

Appellee filed a complaint on July 10, 1959, against appellants, Sinclair Refining Company and William T. Muldrow, claiming that they, or one or more of them, on June 12, 1958, and for a period of time prior thereto of unknown duration, had negligently maintained an unlighted and unguarded stairwell immediately adjacent to a public alley adjoining premises 706 V Street, Northwest, Washington, D. C., into which appellee fell and was injured. (J.A. 7-9)

At the time of the occurrence appellants were owners of the premises 706 V Street, aforesaid, and had leased the same to Sinclair Refining Company under a lease dating from September 13, 1956, which was in turn a continuing tenancy which had been originated September 1, 1949. (J.A. 104, 115) (Pltf's. Ex. 7)

Sinclair Refining Company did not actively operate a business upon the premises but in turn sublet the same to William T. Muldrow who operated therefrom a retail gasoline station selling Sinclair Refining Company's products to the public. (J.A. 106)

As an incident of its September 13, 1956, lease, Sinclair Refining Company obliged appellants to effect a number of items of repair and restoration to the premises all of which were completed by appellants to Sinclair's complete satisfaction prior to the effectiveness of its lease, and it accepted the premises as so repaired and restored. (J.A. 100-106)

Outside lights including flood lights, gasoline pump, and "island" lights were provided, installed and maintained either by Sinclair or its tenant, Muldrow, and the physical turning on and off of these lights was by Muldrow as station operator. (J.A. 90, 94-99)

The appellee charged no active negligence to appellants nor to the remaining defendants. She did charge that the accident, her injuries and damages were caused by negligence of all of them in that they maintained an unlighted stairwell under circumstances reasonably requiring lighting; maintained an unguarded stairwell; maintained an uncovered stairwell immediately adjacent to a public way without notice or warning sign, failed to mark the dividing line between the public space and their property so that persons lawfully using the alley would be sufficiently apprised of the dividing line and thus be warned that appellants' property was private and not fit for use as a public way; thereby creating a hazardous condition, constituting a latent and concealed defect. (J.A. 17, 18)

So far as the issues raised by this appeal are concerned the following picture is presented.

On July 12, 1958, appellee attended a night baseball game at Griffith Stadium, across Georgia Avenue, Northwest, from the premises upon which she was later injured. She was being escorted by William H. Lawrence. They came from dinner to the game in Mr. Lawrence's car which he drove and parked. It was parked on property some distance away from that under ownership, operation or control of appellants, further down the adjoining public alley and on the opposite or westerly side of the alley. (J.A. 66, 69, 70)

In returning to this car, appellee and her escort came westerly on V Street, turned into the alley whereupon because of traffic and conditions unrelated in any way to appellants, they proceeded single file, with appellee leading the way or preceding her escort. (J.A. 35, 37)

After getting substantially into the public alleyway, appellee came upon a car parked therein which obstructed her further straight passage. Appellee thereupon consciously and deliberately turned toward her left, passing to the side of and around that car, and then continued on for a

number of steps into an area which to her was dark and in which she could not see what lay ahead of her. In so doing she stepped into a stairwell entirely on appellant's property and which served as an entrance-way into the basement of the premises owned by appellants. (J.A. 36, 37, 55, 61)

Appellee's escort controverted the element of darkness and stated that it was not dark and that he could see. (J.A. 74, 75)

Every witness who testified to the actual happening supported the existence of a car or cars parked in the alley, or at least partially therein.

Appellant John Toomey, called as a witness by appellee, testified that lighting was normally adequate to illuminate the area into which appellee walked and was later injured, but that he had observed that when a car was parked in the alley it left an area dark, by breaking the effectiveness of the light. (J.A. 116, 117)

No testimony was adduced as to when the stairwell involved in this action had been actually constructed, or by whom. It was established that the buildings on the premises antedated the Sinclair lease. (J.A. 109)

At the conclusion of appellee's case, appellants moved the court for a directed verdict upon the basis that appellee was a trespasser as to them, and not within the exception to the general trespassing rule claimed by appellee, and further that, because without regard to whether the area in which appellee was injured, namely the stairwell, was dark or lighted, contributory negligence existed as a matter of law precluding her recovery from appellants. The court denied this motion. (J.A. 117, 118, 120)

Upon such denial, the court called upon appellants to proceed and appellants proffered in evidence the traffic regulation in effect in the

District of Columbia precluding the parking of any motor vehicle in any public alley at any time. (Section 79 (c) (6)) (J.A. 120, 121) This proffer was rejected by the court and appellants having no direct testimony to offer relating to appellee's accident had no further testimony to offer, rested and renewed their motion for a directed verdict which the court denied.

Thereafter instructions of law were tendered by appellee and appellants, ruled upon by the court, and the case was argued to the jury by counsel for appellee and appellants, after which the jury was instructed by the court. (J.A. 126-136f)

In instructing the jury the court told the jury that there were three defendants. They were the appellants to be treated as one unit, Sinclair which leased the property from appellants as a second, and Muldrow who subleased the same from Sinclair, as a third. He told the jury that "While there are three defendants in this action, it does not follow that if one is liable the others are liable. Each is entitled to a consideration of his own defense separately, but is not to be prejudiced by the fact, if it should become a fact, that you may find against another." (J.A. 129, 130) (Emphasis added.)

He further told them, "You will consider the case against each defendant separately and render your verdict on the claim against each defendant separately." (Emphasis added.) (J.A. 130)

He then charged the jury, "Plaintiff claims that each and all of the defendants were negligent in maintaining a stairwell under circumstances reasonably requiring lighting * * *." (Emphasis added.) (J.A. 130)

"Each of the defendants denies that he or it was negligent in any of these respects * * *." (J.A. 130)

The court later told the jury that it would take up the "claim of the plaintiff (appellee) against each defendant separately, as I have told

you * * *, and then explained four elements of claimed negligence, one of which was "That defendant failed to provide * * * illumination to protect any such person (appellee) from falling into the stairwell." (J.A. 134) (Emphasis added.)

Next the court told the jury, "If you do not find that each and all of these essential elements have been established * * * in respect to one or more defendants, your verdict will be for such defendant or defendants." (Emphasis added.) (J.A. 135)

The court in many further instances made it clear that the jury should consider the case presented as being a separate one against each defendant, with its only admonition being that without regard to how many defendants, if any, were found liable, the recovery was total, not severable. (J.A. 136)

The jury began its deliberation after the court's charge at 3:37 o'clock p.m., December 3, 1962. Nothing having been heard from them by 6:04 o'clock, p.m., they were assembled in the court room and released for the night to resume their deliberations at 10:00 o'clock, a.m., December 4, 1962.

At 10:00 o'clock, a.m., December 4, 1962, the jury resumed their deliberations and at 11:40 o'clock, a.m., requested exhibits which were provided them, and which raise no issue herein.

Nothing was thereafter heard from this jury until 4:49 o'clock, p.m., December 4, 1962, they having deliberated continuously except during their luncheon period arranged by the court without assemblage. At 4:49 o'clock, p.m., December 4, 1962, the court, sua sponte, assembled the jury and proceeded to give them the "Allen Charge," after which they, at a little prior to 5:00 o'clock, p.m., left the court room and resumed deliberations. (J.A. 136i)

At 5:10 o'clock, p.m., they returned to the court room and upon interrogation by the deputy clerk asserted that they had reached a

verdict. Pursuant to the exact formula which the court had announced to them as to what would be their procedure, they announced that in the claim of Virginia Warren Daly against the defendants, James C. Toomey and John J. Toomey, they found for defendants (appellants). (J.A. 136k)

They thereafter found further for defendant, Muldrow, but for appellee against defendant, Sinclair.

The court did not pursue its announced format further by determining the amount of the jury's verdict against defendant Sinclair, but precipitately ordered the jury back into the jury room, after which the court stated to counsel that it could not see how the jury verdict could be consistent in finding only against Sinclair and against no other defendant. (J.A. 136k)

Appellants pointed out to the court that lighting was an important factor as to which Sinclair separately under the testimony could be liable, and this position was agreed to by appellee as well as by defendant Muldrow. (J.A. 136l, 136m)

The court nevertheless ruled that the jury's verdict was "inconsistent with my instructions," and decided to reinstruct them in part, nullifying its earlier charge, to the end effect that they were told that they could, if they found for appellee, hold Muldrow only, or all three defendants, including appellants. Appellants duly objected to this action by the court. (J.A. 136m)

At 6:12 o'clock, p.m., the jury was again recalled and taken to dinner, since no verdict had been reached.

At nearly mid-night, 11:05 o'clock, p.m., the jury, having come to no conclusion after the court's "new" partial and additional charge, was released for a second night. (J.A. 136q)

They resumed deliberation at or about 10:00 o'clock, a.m., on December 5, 1962, and at 12:30 o'clock, p.m., December 5, 1962,

announced that they had agreed upon a verdict. Upon interrogation that verdict was for \$17,000.00 against appellants and all other defendants. (J.A. 136q, 136n)

Appropriate motions were duly filed by appellants, as to which the court ordered a remittitur reducing appellee's recovery to \$12,000.00, conditioned upon acceptance of such reduction by appellee, and denied further relief to appellants who duly thereafter noted their appeal.

REGULATION

Section 79 (c)(6) Traffic and Motor Regulations of the District of Columbia

(c) No person shall park a vehicle, whether occupied or not, otherwise than temporarily for the purpose of and while actually engaged in loading or unloading of passengers or freight in any of the following places:

* * * *

6. In any public alley * * *." (Exceptions not involved herein follow the quoted section)

STATEMENT OF POINTS

1. The trial court erred in refusing to permit appellants to offer in evidence the requirements of Section 79(c)(6) of the D. C. Traffic Regulations, precluding any parking at any time in a public alley. Violation of this regulation could have per se constituted negligence which the jury could well have found to be the sole proximate cause of appellee's injury.

2. The trial court erred in its determination that under the proven facts of this case, appellee had brought herself for purposes of recovery under either the provisions of Section 367 or 368 of the Restatement of the Law of Torts. (Presumably the Court ruled out Section 367).

3. The trial court erred in refusing to direct a verdict in favor of appellants upon their motion therefor, when under either theory of appellee's case, the place upon which she was injured was either dark, or lighted, either of which premise precluded her recovery because of her concomitant contributory negligence.

4. When the trial court instructed the jury that this action was one against three defendants, any of whom might be liable, dependent upon said jury finding that all found liable concurred in maintaining a condition which it had to find was in fact maintained with all essential elements lacking in order to hold all defendants liable, the court was not justified in rejecting the original verdict of the jury which of necessity had to have followed such instructions even though the court then decided that such determination was inconsistent with one of its instructions, a conclusion not concurred in by appellants, co-defendant Muldrow, or for that matter by appellee. The element necessary to have held appellants to liability and for which the testimony indicated they were not liable was the necessity to have provided adequate lighting fixtures. This was neither their responsibility nor that of defendant, Muldrow, under the court's instructions, and it is obvious that when the jury found Sinclair alone liable to appellee it was because Sinclair had failed to provide adequate lighting fixtures.

When the jury was reinstructed this element was eliminated since the jury was then instructed that if it found for appellee its verdict had to be against all defendants unless only one (Muldrow) was liable because appellee was injured for the failure of having turned on lights which did exist. This was tantamount to directing a verdict for appellee against these appellants.

SUMMARY OF ARGUMENT

1. The testimony adduced in support of appellee in this case established beyond any doubt that automobiles were parked in the public alley immediately adjoining 706 V Street, N.W., and insofar as appellee's own testimony was concerned, that as she proceeded through that alley, she reached such a vehicle, whereupon conscious thereof, she decided to pass to its left and thereupon entered upon appellants' owned and leased property. While she was thereon, she slipped into an inadequately lighted stairwell and was seriously injured.

Appellants submit that parking of any vehicle in the public alley was in violation of pertaining traffic regulations, and, constituted the sole cause of appellee's injuries. If this was the sole cause, then obviously appellants were not liable.

The court refused appellants' request to introduce a pertinent traffic regulation in evidence, and they submit this was error.

2. Appellee was admittedly injured while upon appellants' property as a normal trespasser thereupon. She exonerated herself in this relationship by claiming that her presence thereon was in reliance upon Section 367 of the exceptions recognized under the Restatement of the Law of Torts, or under Section 368, another exception. Section 367 recognizes an exception only in favor of persons unintentionally upon private property, which did not pertain herein, and Section 368 provides for recovery only for a person who is injured from a cause immediately adjoining the public way, such as did not pertain herein. The evidence in this case clearly established a deliberate departure from the known public way onto private property, the character of which was totally unknown to appellee.

3. When a court instructs a jury specifically upon what grounds it can find an individual and separate defendant liable, that court cannot thereafter decide that the verdict returned by the jury is inconsistent

with its earlier instructions absent protest by any party affected by the particular or singular verdict, nor can it reject, vacate, or refuse to accept the same solely upon the basis of claimed inconsistency.

ARGUMENT

Appellants' argument herein can be cast in four segments. These are being treated herein out of sequence, but in the order of their believed importance to appellants.

Thus appellants' first point to be urged is the refusal of the court to have permitted appellants to place in evidence the proffered District of Columbia Traffic Regulation prohibiting the parking of motor vehicles in any public alley.

Appellee's claim presented a unique and extraordinary matter for disposition by the trial court. Her claim posed a legal point without precedent in this jurisdiction, and was presented by her as being an exception to the unusual rules of law.

But for appellee's claim of exception, she was nothing more nor less than a trespasser upon appellants' real property, entitled to no more consideration while thereupon than to be protected against wilful entrapment and injury by appellants.¹

She in effect, through her evidence had claimed that these appellants maintained on their premises a dangerous condition, a nuisance, which from her observation led her to believe that their real property was an extension or continuation of the public way, safe for her use, but in fact dangerous, an exception created by law.

As to this appellants then ask, "Why was she upon their property?" The testimony without dispute shows that she had no business thereupon. The car to which she was proceeding was not parked thereon,

¹ Firfer v. United States, 208 F.2d 524.

never was and was known by her not to have been. Her only purpose for being on appellants' property was a means of access to that car which by her testimony was parked at a place unknown to her; and by her escort's testimony was at a place a considerable distance and on the opposite side of the alley in which she was walking when she was injured. No other witness had any knowledge of appellee's destination.

Approaching this destination, appellee was confronted with a vehicle parked illegally in the public way, the alley. No witness controverted the fact that a car or cars were parked in the alley. If so, such parking was absolutely and without exception an illegal act.² Appellee testified that when confronted with this vehicle, and for no other reason, she was obliged to change her direction of travel. She had a free choice. She could have gone to either the right of that vehicle, could have stopped and waited for passing traffic, if any, or she could go to its left. To the right was the public alley, which she well knew, to the left was into darkness and into an area the nature of which she was unaware of, and which developed to be dangerous to her and which was private property. She consciously made her choice and was injured in so doing.

Mr. John Toomey, an appellant, had testified that normally the area into which appellee wandered was sufficiently lighted by existing lighting but that when any car was parked in the public alley it broke off light provided from across the alley on the west, and further that another light which had at one time been directly over the stairwell where appellee fell was not there in 1958, although he thought it had been there some years before when co-defendant, Sinclair, had first rented the property.

Lighting of the stairwell was held by the court to be an obligation of the occupant of the property, such occupant being defined by the

² Section 79 (c) (6) D. C. Traffic Regulations.

court to include an owner. In this posture it is submitted that 1) assuming that lighting normally existing was thwarted and blocked by the illegal parking of a motor vehicle in the public alley, or 2) a lighting fixture originally provided by appellants was gone and not replaced by tenant (Sinclair) who was obliged to make repairs under its lease, then for the purpose of its proffer appellants were entitled as a matter of law to offer in evidence a Traffic Regulation clearly violated, since a violation thereof would within the circumstances of this case have constituted negligence *per se*, which the jury under proper instructions could have found to have been the sole proximate cause of appellee's injuries.³

The court refused appellant's proffer of this regulation and treated this proffer cavalierly, suggesting that it be "whispered" to appellee's counsel. The import of the regulation was real and not unimportant. A witness called by appellee had without contradiction testified that a car illegally parked in the alley would prevent the accomplishment of the very effect that every facility established by any defendant in this case was designed to meet. The illegal parking of any car in the public alley contrary to the Traffic Regulations should have been submitted to the jury under appropriate instructions as the possible sole proximate cause of appellee's injuries and the refusal of the trial court to permit evidence of the regulation was reversible error.⁴

Point 2 of appellants' position flows almost directly from the preceding position. The exception to the general rule regarding trespass is expressed in Sections 367 and 368 of the Restatement of the Law of Torts upon which appellee relied to recover below.

³ Ross v. Hartman, 139 F.2d 14, 78 U.S. App. D.C. 217, Claxton Inc. v. Schaff, 169 F.2d 303, 83 U.S. App. D.C. 217, Slingland v. D. C. Transit Co., 105 U.S. App. D.C. 264, 266 F.2d 465, Violette v. Campbell, 134 A.2d 330 (M. Ct. Apps. D.C.).

⁴ Slingland v. D. C. Transit Co., 105 U.S. App. D.C. 264, Violette v. Campbell, 134 A.2d 330 (M. Ct. Apps. D.C.).

The impact of either of those sections (distinguishable inter se as appellants will hereinafter demonstrate) rests upon the claimant being drawn to or upon the private property involved in reliance upon the appearance of that property as an extension or continuance of the public way which they adjoin. The appellee in this case did not enter appellants' property with a predilection that such was an extension or continuance of a public way, but to the contrary entered the same upon her own determination that presumably without regard to what or whose property it was, it was a choice of ways to by-pass an automobile illegally parked in an alley, and to thereby continue toward a car parked further distant to which she wished access. In this posture neither appellants, nor any other defendant, owed her any duty insofar as their property was concerned, for she came not upon it in any reliance as to its appearance, but solely to serve a purpose not even remotely related to appearance. By her own testimony there was no appearance because it was so dark she could not even see where or upon what she was walking.

Section 367 of the Restatement of the Law of Torts states:

"A possessor of land who so maintains a part thereof that he knows or should know that others will reasonably believe it to be a public highway, is subject to liability for bodily harm caused to them while using such part as a highway, by his failure to exercise reasonable care to maintain it in a reasonably safe condition for travel."

The comments to this section clearly indicate that its intended application is to situations wherein the possessor of real property has upon the same something which appears, resembles or looks like a part of the highway. It is immediately obvious that a stairwell bears no resemblance to a highway, and of more significance appellee did not know what anything in the area in which she was injured looked like, because during four to five steps which she said she took, it was too dark to see anything. If it was too dark to see, the stairwell and the

area adjacent to it did not appear to be a highway or for that matter appear to be anything capable of description other than darkness.

Section 368 of the Restatement of the Law of Torts, states:

"A possessor of land who creates or maintains thereon an excavation or other artificial condition so near an existing highway that he realizes or should realize that it involves an unreasonable risk to others accidentally brought into contact therewith while traveling with reasonable care upon the highway, is subject to liability for bodily harm thereby caused to them."

This section is considered to provide a remedy where the lawful user of a highway is accidentally injured by an excavation or condition so close to the highway that the user of the highway is injured because of the proximity of the dangerous condition to the public way, not that he is first lead therefrom and thereafter injured.

In the case herein appellee was not within this exception because she did not immediately step from the public alley into the open stairwell, but on the contrary reached the stairwell after having presumably taken some four or five steps across appellants' property, the entry upon which was completely devoid of having been induced by any appearance protected under Section 367 of the Restatement quoted above.

This was argued to the court below as ground for a directed verdict for appellants and it is again urged here. The short answer is simply that the appellee in this case was not within the exceptions provided by either Section 367 or 368 of the Restatement.

The trial court decided at this juncture, namely on appellants' motion for a directed verdict, that appellee was within the exception for which she contended. It did so in reliance upon Louisville & N. R. Co. v. Anderson, 39 F.2d 403 (C.C.A. 5th 1930).

Appellants submit, however, that despite their arguments and efforts to persuade the court that an important and vital distinction existed between rights created under Sections 367 and 368 of the Restatement as above quoted (Tr. 553-557, 559-563), appellee insisted that she was relying upon both sections (Tr. 583-591), and the court denied appellants' motion.

Louisville & N. R. Co. v. Anderson, *supra*, without referring specifically to either of the quoted sections, presented factually, and determined a situation which did encompass both sections. As to Section 367's application, the following appears:

"In this case there was evidence introduced by plaintiff tending to show * * * that the defendant had created on the lands it was occupying, an appearance that a reasonably prudent driver of an automobile on a dark, foggy night might have been misled into believing that Belmont Street extended beyond Tarragona Street to and beyond the point where the defendant had constructed its sunken track * * *."

It elsewhere stated,

"There is a duty upon the occupant of premises abutting on a highway or street to refrain from creating near the road unguarded excavations which endanger travelers along the road."

This is clearly an application of 368. Combined they presented a defendant who created both an appearance of a continuing public way and a dangerous condition adjacent to that way, resulting in that defendant's liability.

The decision, if carefully studied, clearly indicates that unless a 368 situation is created so close to the highway that the lawful user of the highway is injured by it without having been deceptively lead to it, no recovery can be had by the claimant. As expressed by the Court this was held:

"If it (the excavation) is far enough from the highway not to endanger one who remains upon it, then liability can be imposed upon the occupant of the premises only if he creates a deceptive appearance of the situation, such as would justify a reasonably prudent man in straying from the highway, believing himself to be still upon it."

The important factors appear in the above decision which were not met by appellee and which required the trial court to direct appellants' motion, if the decision has the vitality and effect accorded to it by the trial judge.

The first of these is the element of creation. There was no testimony as to by whom or when either the stairwell, the area between appellants' building and the public alley, or the public alley were created. For that matter there is no acceptable testimony as to even the boundaries of the property or alley.

Appellants cited to the court, City of Ft. Worth v. Lee, 186 S. W. 2d 954 (Texas, 1945) which referred to Section 368 above cited, and clearly held that proof of creation of the condition was essential to establish liability thereunder.

Failing to have proved this, appellee's case under 368 also failed for in regard thereto, appellee did not encounter the stairwell by accidentally stepping from the public way into it. On the contrary, some distance, well prior to reaching its proximity, appellee, who was then in the public alley, and with a choice of remaining therein, or of turning onto and upon property so dark that she could see nothing, chose the latter. She did this voluntarily and not by virtue of a deceptive appearance. This precludes her recovery. Knoxville v. Baker, 25 Tenn. App. 36, 150 S. W. 2d 224, Anderson v. Speer, 36 Ga. App. 29, 134 S. E. 811.

The third segment of appellants' appeal is addressed to their motion for a directed verdict based upon the undisputed contributory negligence of appellee. Either the area into which she walked and was thereafter injured was dark or it was not dark. She claimed it was dark, so dark that she was unable to see where or upon what she was walking, despite which she chose to walk into that area when she had an alternative choice of passing to the right of the parked car thereby continuing in the public alley more directly to her escort's car. To deliberately walk ahead in such darkness as appellee described was contributory negligence as a matter of law.⁵

On the other hand, if it was not dark as appellee's escort testified, her failure to see that which was plain to be seen constituted negligence on her part equally barring her right to recover.⁶

The final error claimed upon which appellants rely is the action taken by the trial court in its rejection of the verdict which the jury initially returned herein and which clearly absolved these appellants and their co-defendant from liability herein to appellee.

As appellants have stated heretofore in their Statement of the Case in this brief, the court clearly and properly instructed the jury that there were three separate defendants involved in appellee's action and that it did not follow therefrom that if one was liable the others would be liable. He told them that each was entitled to have his own defense considered separately, and finally he told them that their verdict would be rendered separately as to each defendant.

He told them as follows:

⁵ Houser v. Harrisburg, 48 Dauph Co. 119 (Pa. 1939); Du Rocher v. Teutoma Motor Car Co., 188 Wis. 208, 205 N.W. 921 (1925); Bruce v. Risley, 15 Cal. App. 2d 659 (1936), 59 P.2d 847; Missouri, K. & T. R. Co. v. Turley, 85 F. 369 (C.C.A. 8th, 1898).

⁶ Capital Transit Co. v. Holloway, 35 A.2d 649 (M. Ct. Apps. D.C.), Brown v. Saunders, 89 A.2d 632 (M. Ct. Apps. D.C.).

"You will take up the claim of the plaintiff against each defendant separately, as I have told you, and the essential elements of the plaintiff's claim which you will apply to each defendant, except as I shall otherwise state, are (as) follows:

* * *

(3) That defendant failed to provide reasonable illumination to protect any such person from falling into the stairwell. * * *

If you do not find that each and all of these essential elements have been established by a preponderance of the evidence in respect to one or more defendants, your verdict will be for such defendant or defendants."

This court will remember that the posture inter-party of the defendants was that appellants were owners and landlords of the premises and as to them, Sinclair was tenant. Sinclair thereafter was landlord to Muldrow.

The lease between appellants and Sinclair was in evidence and Sinclair's lease with Muldrow was likewise in evidence. Testimony of appellant, James J. Toomey, and of Sinclair's agent, Joseph G. Potts, left a question open as to upon whom an obligation to have provided a guard rail would have existed, but clearly showed that Sinclair had demanded and received from these appellants all repairs and renovations which Sinclair deemed necessary from its landlord to place the premises in a satisfactory and usable condition for its purposes. This is in accordance with the law of this jurisdiction.⁷

To make the premises suitable for its further purposes, Sinclair installed flood lights, pumps with lights, illuminated signs and all gasoline station fixtures. In addition thereto, its lease with appellants required Sinclair to make all repairs to the premises except some immaterial to this action.

⁷ Keroes v. Richards, 28 App. D.C. 310.

Muldrow installed no lighting fixtures or equipment, nor was he obliged to, although his lease did require him to make repairs.

In addition to the "station" lights there had, at one time, been a single light over an upward stairway adjacent to the down stairwell in which appellee fell. This disappeared during an earlier tenancy of Sinclair of appellants' property and had not been replaced prior to appellee's accident. The 1956 lease did not require this replacement by appellants.

In this posture and under the court's instructions, briefly summarized where pertinent above, the jury, after many hours of deliberation, announced in open court that they had reached a verdict.

Pursuant to its announced format for receiving the same, the court proceeded to receive the verdict and the jury announced that it had found for appellants and against appellee, for appellee and against Sinclair, and for Muldrow and against appellee, when the court suddenly and sua sponte stated:

"Members of the jury, you apparently have mis-understood one of my instructions. When you find against the Sinclair Refining Company — and did you say for or against Muldrow? * * * I will ask you to retire to the jury room while I discuss this question with counsel, and I withdraw what I have just started to say to you and I will instruct you further."

The court then stated to counsel that in its opinion the verdict was inconsistent with its instructions, to which counsel for appellants protested, as did counsel for Muldrow and counsel for appellee, each deeming the verdict not inconsistent and stating reasons why it was not, each of which reasons being supported by substantial evidence.

A motion for a mistrial was made and without opportunity to present argument or to be heard the jury was recalled and again charged. The new charge clearly and unequivocally told the jury that

they must find against all defendants with but one exception, namely the failure to have turned on lights which were there to turn on. The adequacy or inadequacy of whatever lights the jury found existed or were required to exist became a common burden upon these appellants, defendant Muldrow and Sinclair without any regard to the court's earlier charge in which they had been properly charged that a verdict to be sustained against a defendant must find that each defendant was legally responsible for each element necessary to enable appellee to recover.

The court's additional charge to the jury was prefaced by its remark, "You apparently misunderstood one of my instructions on the law, when you find against the Sinclair Refining Company and for the Toomeys and for Muldrow." Appellants submit that this remark by the court was beyond its prerogative and could do nothing but intimidate, coerce, and mislead a jury which had theretofore been told not once but over and over again that they were considering three cases, three defendants, and were to render separate verdicts as to each.

In its additional instructions to the jury they were never told that any of the original instructions any longer bound them.

Mr. Muldrow's counsel asked that the jury be discharged and appellants' counsel concurred.

Appellee's counsel announced satisfaction with the partial verdict (as to liability against Sinclair) and wished to abide by the court's discretion as to the "remainder" presumably "the amount." Appellants concur in this. Either that verdict should have been completed after which parties litigant could formalize the same and proceed thereagainst, or the court after its obvious blunder should have declared a mistrial. Any verdict rendered thereafter by that jury was and remained suspect.

The only ground asserted by the court for its action was that the jury verdict was inconsistent with one of its instructions. This within and of itself is tantamount to saying that the court had directed restricted verdicts. Appellants submit that no party to this action, let alone this appeal, was entitled to a restricted verdict, after appellants' motion for a directed verdict had been denied. At this posture no party had moved for any restrictive verdict nor did the case permit one, if appellants' motion for a directed verdict was not justified.

Absent that the mere inconsistency of a verdict is not justification for action by the court. Lansburgh v. Clark, 75 U.S. App. D.C. 339, 127 F.2d 331.

CONCLUSION

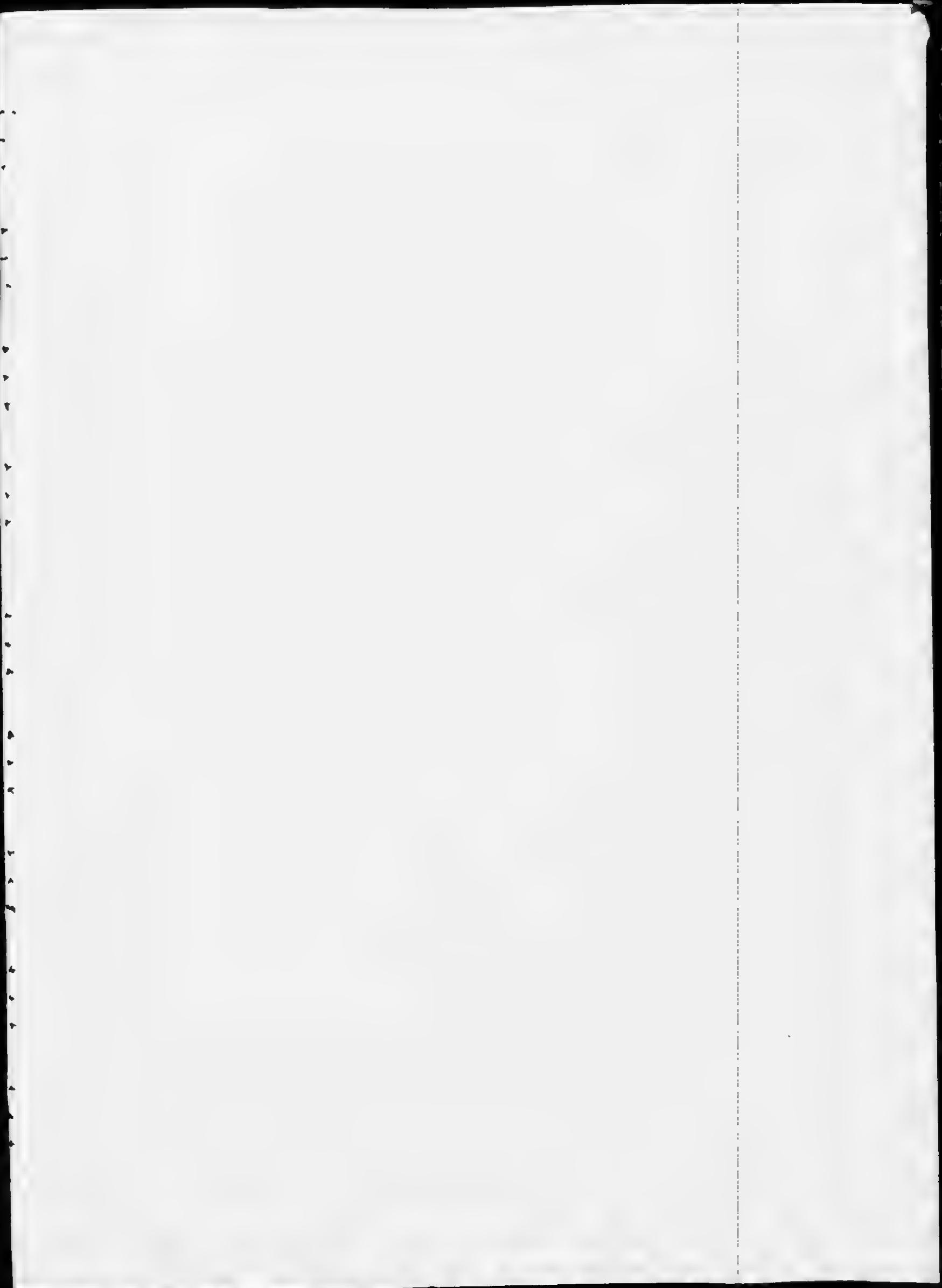
Because of the errors committed during the trial of this cause and appellants having timely filed a motion for judgment non obstante verdicto, this cause should be reversed and remanded to the United States District Court with instructions to enter judgment for appellants as a matter of law and upon appellee's clear contributory negligence, or at least for a new trial because of the errors apparent.

Respectfully submitted,

HARRY L. RYAN, JR.

815 - 15th Street, N. W.
Washington 5, D. C.

Attorney for Appellants



+8X
+2X

BRIEF FOR APPELLANT

United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,879

576

SINCLAIR REFINING COMPANY,

Appellant,

v.

VIRGINIA WARREN DALY,

JAMES C. TOOMEY and JOHN J. TOOMEY,
Trustees under the Estate of
Ellen C. Toomey, deceased,

and

WILLIAM T. MULDROW,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

United States Court of Appeals
for the District of Columbia Circuit

FILED SEP 23 1963

Nathan J. Paulson
CLERK

JOHN P. ARNESS,

800 Colorado Building
Washington, D. C.

Attorney for Appellant.

HOGAN & HARTSON

Of Counsel.

(i)

QUESTIONS PRESENTED

1. Did the trial court err in refusing to direct a verdict when it appeared that appellee advanced two dissimilar and inconsistent theories, because in such circumstances neither theory can be held to be supported by substantial evidence?
2. Did the trial court err in refusing to declare appellee to be contributorily negligent as a matter of law?
3. Did the trial court err in refusing to permit appellant to demonstrate that its relationship to appellee was different than that of its co-defendants and that it neither had control over the condition complained of, nor the duty to improve it?
4. Did the trial court err in its application of Restatement, Torts § 368 to appellant when it appeared that appellee was not an unintentional trespasser; when that section's applicability depends upon the existence of a nuisance, which concept was never submitted to the jury in the instant case; and when it appeared that this appellant did not have ownership, possession or control of the property at the time of the accident?
5. Did the trial court err in accepting the final verdict of the jury which was rendered after the jury had clearly indicated its propensity to be arbitrary and was the product of erroneous instructions and circumstances which were tantamount to coercion?

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United States Court of Appeals

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 17,879

SINCLAIR REFINING COMPANY,

Appellant,

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VIRGINIA WARREN DALY,

JAMES C. TOOMEY and JOHN J. TOOMEY,
Trustees under the Estate of
Ellen C. Toomey, deceased,

and

WILLIAM T. MULDROW,

Appellees.

APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT

JURISDICTIONAL STATEMENT

The United States District Court for the District of Columbia initially had jurisdiction pursuant to the provisions of Title 11-306, District of Columbia Code, 1951 Edition. A final judgment against all defendants was entered January 30, 1963 (J.A. 153-154). Notice of

appeal was filed March 1, 1963 (J.A. 155). This Court has jurisdiction pursuant to the provisions of Title 28 U.S.C.A., § 1291.

STATEMENT OF THE CASE

Appellee, Virginia Warren Daly, sustained personal injuries on June 12, 1958 when she fell into a stairwell on the west side of a building located near the corner of Georgia Avenue and V Street, N.W., in the District of Columbia (J.A. 7, 17). The property on that corner was owned by defendants James C. Toomey and John J. Toomey, Trustees, and had been owned by the Toomey family since approximately 1900 (J.A. 110). A portion of it had been leased to defendant Sinclair Refining Company (J.A. 19-21) and subleased to an independent operator, defendant William T. Muldrow.

Four witnesses to the accident were called to testify. They were plaintiff, Virginia Warren Daly (J.A. 25-38, 54-64), her escort of that evening, William Lawrence (J.A. 65-76), Robert Smith (J.A. 39-53), and Virginia Riley (J.A. 77-88). In addition, the station operator, William T. Muldrow, testified (J.A. 88-98) concerning his recollection of the circumstances existing at the time of the accident. There was extraordinary conflict in the various descriptions of the circumstances surrounding the accident. However, all witnesses agreed that appellee went to Griffith Stadium on the evening of June 12, 1958, in the company of William Lawrence, to view a Washington Senator baseball game (J.A. 26, 40, 66); that after the game she walked with her escort across Georgia Avenue, along the public sidewalk on the south side of V Street, and into an alley adjacent to which Mr. Lawrence had earlier parked his car (J.A. 27, 67); that she then turned left and proceeded in a southerly direction until she reached the vicinity of the fall (J.A. 27, 54-57, 67); that she did not go upon the service station premises (J.A. 48, 67); that she was one of many pedestrians travelling in the same direction (J.A. 36, 71); and that while in the alley she encountered oncoming automobiles, which were emerging from the alley onto V Street (J.A. 35-36). There

was no conflict with appellee's testimony to the effect that she did not stumble, slip or trip and that she took no special precautions as she walked in what she termed to be a normal manner down the alley (J.A. 60, 65).

William Lawrence testified that, in approaching Griffith Stadium, he drove his automobile south into the alley off V Street and parked it in a backyard on the west side of the alley some distance from V Street (J.A. 66, 69-70). He stated that thereafter appellee got out of the car and walked down the alley, past the stairwell into which she later fell (J.A. 70). He said that there was no need to lead appellee on the return trip because she knew where the car was and where she was going (J.A. 73). Appellee denied this (J.A. 37). It was appellee's claim that as she walked down the alley there was a moving line of cars immediately to her right (J.A. 58); that when she neared the end of the building she encountered an automobile parked parallel to the rear of the building, directly in her path, so that she was faced with the alternative of going to its right or to its left (J.A. 27-28, 57); and that as she went to the left and took a few steps she fell into the stairwell (J.A. 55-56). All of the other witnesses deny the existence of this parked car and testified that appellee proceeded in a straight line without deviation from the alley to the place of her fall (J.A. 45, 73, 80). Mr. Lawrence and Mr. Smith testified that appellee walked to the left of a line of parked cars that extended substantially all of the way from the sidewalk to the building (J.A. 45, 72-73, 76). Appellee denied the existence of such a line of parked cars as did Virginia Riley and William T. Muldrow (J.A. 25-38, 54-64, 77-98). Appellee claimed that the alley was dark. However, her escort, who accompanied her to the point of the fall, testified that he never observed any shortage of light (J.A. 72, 75).

Appellee's explanation for having fallen into the stairwell clearly demonstrated her contributory negligence. She claimed that she walked abreast of Mr. Lawrence, down the alley, following a number of other pedestrians who were leaving the ball game (J.A. 34-36). When she encountered the automobile which was allegedly directly in front of her,

she elected to go to its left (J.A. 56-57) even though she had not seen any of the other pedestrians ahead take this route (J.A. 57). Having done so, she found herself in a confined area between the side of an automobile and the back of a building (J.A. 57, 59). Instead of stopping or proceeding with caution, she continued to walk in a normal manner as she would have on a street or sidewalk in daylight (J.A. 59-60). She would not deny, in response to direct inquiry, that it occurred to her at that time that she might meet a dangerous obstruction (J.A. 64) and she freely admitted that when she reached a point where she could not see (J.A. 64) without paying attention to her safety (J.A. 64), she kept right on walking until she fell into a hole (J.A. 64). The trial court refused to declare this conduct contributory negligence as a matter of law (J.A. 120).

The trial court correctly ruled that if appellee came onto the Muldrow service station premises under these circumstances, she was a trespasser (J.A. 118). There was no other relationship established between the plaintiff and the various defendants. As previously stated, the Toomeys owned the entire premises (J.A. 108-116). They leased a portion of the premises to Sinclair (Exhibit No. 7), which lease specifically authorized Sinclair to sublease. The owners, by necessary implication, from the terms of the lease, retained the right of entry; agreed to make certain repairs (Sec. 8); precluded Sinclair from making any structural changes (Sec. 7); required Sinclair to extract from its sublessee an agreement to comply with the terms of the Toomey-Sinclair lease (Sec. 4); and required Sinclair to surrender the premises at the expiration of the term of the lease in good order, with the usual exception for normal wear and tear (Sec. 9). There was no provision in the lease which required or authorized Sinclair to make any types of changes or additions to the property, although the lease did authorize Sinclair to make certain repairs of existing facilities (Sec. 8). Pursuant to the authority granted by the owners and to the usual custom and practice that had existed for many years, Sinclair immediately subleased the property to

an independent dealer for actual operation. The lease between Sinclair Refining Company and William T. Muldrow (Exhibit No. 6) required Muldrow to assert and maintain the right of entry and possession against all third persons and excused Sinclair from all duty and liability with respect thereto (Sec. 8); it precluded Muldrow from permitting or continuing the existence of any nuisance on the premises (Sec. 8); it required Muldrow to maintain the driveways, approaches and sidewalks adjacent to the station in good condition (Sec. 9); it required Muldrow to return the station upon the termination of the lease in the same condition as received, except for reasonable wear and tear (Sec. 17); and it precluded Muldrow from making any alterations or changes without first procuring written consent to do so (Sec. 20). It was stipulated at the time of trial that there was no principal-agent relationship between Sinclair and Muldrow and that Sinclair was sued only in its capacity as intermediate lessee-lessor and not by reason of any action having to do with the actual operation of the service station (J.A. 91-92). This stipulation conformed with the actual testimony that Sinclair never actively operated the station at any time and was never in actual control of the premises (J.A. 106). The trial court instructed the jury that:

... Sinclair Refining Company, as lessor of the filling station premises involved, is not responsible for any acts of negligence committed by the defendant, William T. Muldrow, in the active and everyday operation of the premises which he as an independent operator entered into under his lease with the defendant, Sinclair Refining Company. (J.A. 133)

The plaintiff was negligent as a matter of law, but having denied defendants their right to directed verdicts on this ground, the trial court next considered whether plaintiff had established a case worthy of jury consideration on the issue of negligence. Apparently the trial court concluded that plaintiff, even though a trespasser, was not to be denied a recovery because of an exception to the general rule which came about by reason of the fact that the condition complained of was a nuisance. (J.A. 144). The trial court relied upon Louisville & N.R. Co. v. Anderson, 39 F.2d 403 (5th Cir. 1930) (J.A. 144) but never defined a nuisance in its

charge to the jury (J.A. 127-136). Indeed, plaintiff never requested an instruction on the law of nuisance. Therefore a recovery was obtained by virtue of a claimed exemption involving a nuisance without ever acquainting the finder of fact with the definition of that very technical and narrowly defined legal concept. Moreover, although there were three defendants, the trial court refused to draw any distinction between them (J.A. 122-123). It imposed just as much liability upon the intermediary, Sinclair, as it did upon the owner of the property, who had all the incentive, power and dominion to improve or modify, and upon the operator who was in active possession and control (J.A. 116-126).

Appellant, Sinclair, took the position that tort liability could be lawfully imposed in a case involving an alleged defect in premises only upon the basis of (1) ownership, (2) possession, or (3) control, because one of the three attributes are necessary to give rise to duty and the right to remedy (J.A. 116-126). The trial court erroneously concluded that the relationship of the particular defendant to the land at the time of the accident was immaterial (J.A. 116-126) and held that the relationships created by the leases were immaterial to the defense of plaintiff's claim (J.A. 146-147). However, the trial court did admit the leases into evidence and did permit questions based thereon (J.A. 89, 100). Appellant, Sinclair, contended that it was not negligent in that it did not create the condition complained of and that it had no duty to plaintiff with respect to it because it did not have possession or control at the time of the accident and, further, because it was precluded under its lease from making structural changes to the premises. Its lessor, Toomey, denied that a change in the character of this stairwell would be structural and a dispute, therefore, arose with respect to whose duty it was to make improvements and in whose control the stairwell was. Upon these issues appellant Sinclair offered evidence in the form of a factual stipulation that after the accident the owners did in fact install a railing on the stairwell (J.A. 113-114). This proffer was rejected by the trial court (J.A. 114) and as a result the case went to the jury without any evidence as

to how the parties to the lease treated this particular portion of the premises or who actually exercised control over it.

Appellant, Sinclair, rested upon the trial court's denial of its motion for directed verdict at the conclusion of plaintiff's case (J.A. 120). Thereafter certain requested instructions were denied (J.A. 122-126). In its charge to the jury the trial court outlined what it termed to be the essential elements of plaintiff's cause and in essence left the jury with three alternatives (J.A. 134-136). If they found that there was an excavation into which a reasonable person using the public alley might stray, then all three defendants had the obligation to take reasonable precautions and if such precautions were not in effect at the time of the fall, all three were liable. Second, if the fall was caused solely because of lack of light only defendant Muldrow was liable. Third, if there was no excavation into which a reasonable person might stray, or if reasonable precautions, including adequate lighting, were taken, or if plaintiff was contributorily negligent, all three defendants should be exonerated.

The jury was unable or unwilling to reach a verdict in accordance with the trial court's instructions. After a prolonged period of time the trial court on its own initiative, and over the objection of counsel for all three defendants, gave the jury the so-called "Allen Charge" (J.A. 136i). Ten minutes later the jury returned with a verdict against the corporate defendant only (J.A. 136k). The trial court was unable to accept this verdict because it was obviously arbitrary and inconsistent with the court's charge (J.A. 136k-136m). The trial court failed and refused to discharge the jury and to declare a mistrial and, without giving counsel for defendants an opportunity to submit proposals, it reinstructed the jury in a prejudicial manner which insured a result in plaintiff's favor (J.A. 136m-136n). After further prolonged deliberation the jury eventually returned a verdict against all defendants (J.A. 136q-136r). The trial court denied post trial motions for judgment notwithstanding the verdict and, in the alternative for a new trial (J.A. 153). Also on the assumption that this appellant was responsible in law to appellee, the trial court erroneously granted

contribution to this appellant's co-defendants (J.A. 154). This appeal followed (J.A. 155).

STATEMENT OF POINTS

1. The trial court erred in refusing to direct a verdict because the evidence was conclusive that appellee was contributorily negligent.
2. The trial court erred in refusing to direct a verdict because appellee advanced and proved two dissimilar and conflicting factual circumstances, so that neither can be held to be supported by substantial evidence and because there was no evidence to support the claim that this appellant failed to perform any duty which it owed to appellee.
3. The trial court erred in refusing evidence offered on the issue of control and responsibility for the condition complained of.
4. The trial court erred in refusing appellant's requested instructions; in refusing to recognize in its charge that appellant had a different relationship to plaintiff than the other defendants; and in its failure to fairly balance its charge when it reinstructed the jury.
5. The trial court erred in accepting the final verdict which was the result of improper deliberation, improper instruction, and circumstances which were tantamount to coercion.

SUMMARY OF ARGUMENT

In the instant case an arbitrary jury returned with a verdict which the trial court has found to be excessive against appellant which did not own, possess or control the condition complained of or the property involved, either at the time of the accident or for an appreciable period prior thereto. Appellee's testimony clearly established her contributory negligence as a matter of law and, in fact, she admitted it. Nevertheless the trial court concluded that the case should be submitted to the jury for determination and in search of a legal theory, it relied upon

Restatement, Torts, § 368. The trial court's reliance on that section was erroneous because there is no testimony that appellee was led astray by appearances or was otherwise an unintentional trespasser; because that section depends for its validity upon the existence of a nuisance which was not submitted to the jury as a question of fact; and because that section is applicable to owners or possessors of land and not to this appellant which had no legal right to affect the premises or effect a remedy for the condition complained of at the time of or shortly prior to the accident. The jury obviously was unable to reach a unanimous conclusion that appellee was entitled to recover and at approximately 5:00 p.m. on the second day of its deliberation the trial court delivered the so-called "Allen Charge" on its own initiative and without any indication, other than the mere lapse of time, that the jury was in conflict or in need of pressure. Almost immediately the jury chose the path of least resistance and indicated an intention to return a verdict against the corporate defendant solely. Such a verdict was inconsistent and contrary to the trial court's instructions and could not be accepted. Instead of discharging the jury and declaring a mistrial, or otherwise giving legal effect to the factual findings implicit in the errant verdict, the trial court required the jury to resume deliberation and did so upon the basis of reinstructions which were not fairly balanced and which insured an eventual recovery in favor of appellee. In these circumstances appellant is entitled to have the verdict and judgment reversed and remanded to the trial court with instruction to enter judgment in its favor and, alternatively, all defendants are entitled to a reversal and remand with instructions to award an unconditional new trial.

ARGUMENT

I

Appellee Was Contributorily Negligent
As A Matter Of Law.

Appellant was met with a difficult situation at the time of trial because, while appellee advanced one theory by her own sworn testimony, she introduced a grossly dissimilar theory through the testimony of witnesses. Appellee claimed that she entered the alley and proceeded behind other pedestrians until she encountered a parked vehicle. She did not notice anyone go to the left of it. However, she chose to do so even though she could see that there was a confined space between the back of the building and the side of the automobile. Appellee said that it was dark but that she walked normally into the area without taking any special precautions. She testified that when she reached a point where she could not see she nevertheless proceeded forward without paying any attention for her own safety until she fell into a stairwell. If such admitted conduct does not constitute contributory negligence, it is difficult to imagine conduct which could be held to constitute contributory negligence.

The situation in the instant case is not that appellee was injured while strolling down a public highway where there would be no requirement for her to anticipate obstruction. She, for her own reasons, chose to leave a path on the right side of an automobile which had been followed by other pedestrians who had preceded her down the alley. She went to the left of the automobile into a confined space between the side of the car and the rear wall of a building. It is fundamental that none of the defendants had any obligation to put up lights or barricades to prevent her from leaving the highway. Birchhead v. Mayor of Baltimore, 174 Md. 32, 38, 197 Atl. 615 (1938). In this confined area she had no right to presume that her path would be unobstructed, for it is well known that access must be provided to buildings, especially when they are commercial. As stated by the court in Friedman v. Welwood, 185 App. Div. 268, 172 N.Y. Supp. 842 (1918):

Entrances to buildings by means of stairways leading directly from the street are very common in this city (New York), in many instances within the stoop line; and entrances to subway stations are largely within the sidewalk lines. Such entrances are essential for the transaction of business, the convenient access to dwellings, and the transportation of the population within the confines of the municipality. It would not be practicable to guard such entrances with railings or gates; therefore, it has been the customary practice to have them open and unguarded. A person who uses the city streets must of necessity be subjected to dangers that would not be present on a country highway. For that reason the cases holding that an excavation near a highway should be guarded, relied upon by respondent, can have no bearing upon the case under consideration. A person using the streets of a city must be subjected to the risk of necessary and accustomed use by others of the property adjoining the street. (Id. at 270, 172 N.Y. Supp. at 843-44).

The other factual theory advanced by appellee was that supplied by the witnesses she called to testify. William Lawrence, her escort, said she walked in a straight line without deviation and to the east of a line of parked cars until she fell. He said there was no shortage of light and no parked car obstructing the stairwell, either in whole or in part. If this testimony is the version to be accepted, appellee stepped into a stairwell directly ahead of her which was unobstructed and adequately lighted. In such an event her contributory negligence seems equally clear. Burgan v. Dreyfuss, 104 U.S. App. D.C. 280, 261 F.2d 746 (1958); Altemus v. Talmadge, 61 App. D.C. 148, 58 F.2d 874 (1932); Brown v. Clancy, 43 A.2d 296 (Mun. App. D.C. 1945).

In view of the gross conflict there was no material basis for a conclusion as to exactly what did in fact occur and for that reason alone appellee's claim should have been denied for it was not supported by substantial evidence. Taylor v. Crane Rental Co., 103 U.S. App. D.C. 13, 254 F.2d 351 (1958); Washington, Marlboro & Annapolis Motor Lines v. Maske, 89 U.S. App. D.C. 36, 190 F.2d 621 (1951); Brown v. Capital Transit Co., 75 U.S. App. D.C. 337, 127 F.2d 329 (1942), cert. denied, 317 U.S. 632 (1942).

There Was No Basis For Appellee's
Claim Against Sinclair.

Appellant, Sinclair, was not the owner of the property in question so that it had none of the dominion, right, control or responsibility of ownership. It was not a lessee in possession so that it had no opportunity to institute and maintain temporary protective measures and, of course, could not be charged with the responsibility of one in active possession and control.

There must be established some relationship known to law between appellee and this appellant before a recovery can be permitted to stand. Appellee was clearly not in direct privity to this appellant. She may have had some relationship to Muldrow, but if so, she would acquire no greater rights against this appellant than Muldrow had. Nielsen v. Barclay Corp., 103 U.S. App. D.C. 136, 255 F.2d 545 (1958); Bowles v. Mahoney, 91 U.S. App. D.C. 155, 202 F.2d 320 (1952), cert. denied, 344 U.S. 935 (1953); 32 Am. Jur., Landlord & Tenant § 665. Absent statute (e.g., Fisher v. Whetzel, 108 U.S. App. D.C. 385, 282 F.2d 943 (1960)) or express covenant, Sinclair, being out of control, was not obligated to improve obvious defects existing in the leased premises at the time of the lease and is not an insurer of the premises. Slabe v. Beyer, 149 A.2d 788 (D.C. Mun. App. 1959); Karl W. Corby Co. v. Zimmer, 99 A.2d 485 (D.C. Mun. App. 1953); 32 Am. Jur., Landlord & Tenant §§ 657, 662.

The trial court disregarded these well established and fundamental concepts and in mistaken reliance upon certain provisions in the Restatement of Torts fashioned what it thought to be an exception which favored appellee. According to the trial court when a public nuisance is found to exist, the jury is entitled to find in favor of a trespasser injured as a result of the nuisance if at any time in the past and during the continuation of the nuisance the defendant ever had a leasehold interest in the property involved whether or not he actively occupied the premises and whether or not he had a right of possession or control at the time of the accident.

In support of its view the trial court relied upon Restatement, Torts § 368.

Although the exception which the trial court attempted to apply depended for its validity upon a preliminary finding by the jury that a nuisance existed, that question was never submitted to the jury and the very technical legal concept of nuisance was not even defined in the court's charge. There are more fundamental reasons, however, why the legal principles are inapplicable here. Restatement § 368 applies to possessors of land. The term possession is defined in the same Restatement at § 157 as ". . . occupancy of land with intent to control it . . ." and that section further provides:

In the Restatement of this Subject, a person who is in possession of land includes and includes only one who

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(b) has been but no longer is in occupancy of land with intent to control it, if, after he has ceased his occupancy, no other person has obtained possession

(c) has the right as against all persons to immediate occupancy of land, if no other person is in possession

Section 368 obviously applies to persons in actual occupancy and contemplates an ability to institute temporary measures to warn or protect the travelling public. It could scarcely have been intended to require an intermediary to re-build the premises before subleasing or else sublease at his peril. Section 368 also aids only a traveller who unintentionally steps upon the possessor's land, not an intentional trespasser, even if he does so negligently or by reason of an unavoidable mistake. See § 368, Comment (c). In this case there was absolutely no evidence that appellee was laboring under the misapprehension that she was still on public space. Despite this void in the testimony, the trial court applied § 368 and submitted the issue to the jury where resolution must have been upon the basis of conjecture or speculation.

It is questionable as to whether the trial court should have applied § 368 against any of the defendants, but it clearly should not have done so

against this appellant since it was not a possessor. The proper section of the Restatement of Torts applicable to lessors is § 356, which provides:

Except as stated in §§ 357 to 362, a lessor of land is not liable for bodily harm caused to his lessee or others upon the land with the consent of the lessee or a sub-lessee by any dangerous condition whether natural or artificial which existed when the lessee took possession.

This view is well supported in the authorities. Altemus v. Talmadge, 61 App. D.C. 148, 58 F.2d 874 (1932); Howell v. Schneider, 24 App. D.C. 532 (1905); Warner v. Fry, 360 Mo. 496, 228 S.W.2d 729, 730 (1950); Conradi v. Arnold, 34 Wash. 2d 730, 209 P.2d 491, 498 (1949). The rationale is found in Hilleary v. Earle Restaurant, Inc., 109 F. Supp. 829 (D.D.C. 1952), and Restatement, Torts, § 359, which provides in pertinent part that a lessor is liable only when he has reason to expect that the lessee who assumes actual occupancy and control will not protect the public from its hazard. This principle has obvious logic for there are many different precautions that may be taken to protect the public from the danger which do not involve re-building. Muldrow could have put barrels up around the well -- a rope -- a spotlight or flare -- a plywood cover for night use only -- etc. If Sinclair took such precautions while it was in possession that is all the law would require of it and it is entitled to assume that the next occupant will do the same. (Especially in view of the fact that Muldrow's lease expressly required him to abate all nuisances.)

If appellee was entitled to recover because the premises were so constructed as to lead her to the conclusion that she was actually using public space, there was still no basis for a finding against appellant Sinclair because when the owner so constructed the premises they in effect dedicated a portion of the premises to legitimate use by the public and the lease did not operate to shift the responsibility for maintenance of that portion of the premises to lessee. Altemus v. Talmadge, supra.

Appellee's evidence failed in another material respect. There is no proof that the stairwell created by the Toomeys was constructed after the alley. Such evidence is a condition precedent for reliance upon the theory advanced in the trial court for it is clear that if the District of Columbia acquired and built that alley after the stairwell was already in existence, it would be solely responsible for any hazards thereby created. City of Ft. Worth v. Lee, ___ Tex. ___, 186 S.W. 2d 954, Restatement, Torts § 368, Comment b. Appellee never advanced a satisfactory reason for imposing liability upon the intermediate lessor-lessee and the trial court never really attempted to cope with the problem. It preferred to lump all three defendants together and to refrain from consideration of any difference which might exist in their various relationships to appellee, either at common law or by reason of the leases. This indiscriminate viewpoint led to the incongruous result of imposing liability upon appellant Sinclair for its alleged failure to either abate a nuisance or protect appellee from its hazard when at the time of the accident and for an appreciable period before it was not in possession or control so as to have a legal right to remedy the situation without first seeking another's permission or instituting legal action. One cannot be held liable for a nuisance which it cannot legally abate without action against another. Baggott v. Southern Ry. Co., 300 Fed. 337 (E.D.S.C. 1924).

III

The Trial Court Improperly Excluded Evidence Offered on the Issue of Control and Responsibility For the Condition Complained of.

Except for temporary measures, the only practical way of removing the hazard which appellee encountered was the installation of sides or railings on the stairwell. The original construction of the stairwell was faulty in that the hole was left unguarded. Sinclair contended that this deficiency was a structural defect and attempted to show that it was not negligent (for failure to act as a reasonable person should) because its lease with the owners precluded it from making any structural

modification to the premises. The Toomeys denied this contention and there arose issues as to (1) whose duty it was to make such an addition, and (2) which of the defendants had control of the place where the injury occurred. On these issues appellant Sinclair offered evidence in the form of a stipulation that after the accident the owners did in fact install a rail there. This evidence was offered in order to prove that the owners had reserved the right of control and that this particular addition was treated by the parties to the lease as one which should be made by and at the expense of the owners. The trial court erred in the exclusion of this factual stipulation since it was clearly admissible for the purposes announced. Fine v. Giant Food Stores, Inc., 163 F. Supp. 231 (D.D.C. 1958), rev. on other grounds, 106 U.S. App. D.C. 95, 269 F.2d 542 (1959), 2 Wigmore, Evidence 154 (3d ed.1940). This exclusion was in keeping with the trial court's determination to refuse to discriminate between the relevant positions of the defendants. However, as a result the case was submitted for jury determination of negligence issues without giving the jury vital facts which would have aided in the determination of whether appellant Sinclair acted reasonably under all of the circumstances.

IV

The Verdict in Favor of Appellee Was the Result
Of Improper Deliberation by the Jury, Improper
Instruction by the Court, and Circumstances Which
Were Tantamount to Coercion.

The trial court rejected appellant Sinclair's requested instructions numbers 7 (J.A.137), 9 (J.A.137), 10 (J.A.138) and 11 (J.A. 138). These requested instructions accurately stated the law applicable to Sinclair. The refusal of the court to so instruct the jury was consistent with its determination to treat all of the defendants as though each had the same relationship to the plaintiff as the other. The failure to recognize that different relationships existed set the stage for the confusion and arbitrariness which ultimately developed. There was no way

for the jury to conscientiously attempt to weigh the reasonableness of the conduct of each of the defendants because the trial court elected to treat them all the same. It was for that reason that at the conclusion of the court's charge counsel for appellant Sinclair asked for further and clarifying instructions so as to eliminate the possibility of confusion and of an inconsistent verdict (J.A.136a-136e). Counsel for the owners Toomey concurred with this position and so advised the court (J.A.136b). The court refused to give clarifying instructions and said: "Well, I think I will let it go. If they come out with an inconsistent verdict, I will take care of it." The jury began deliberation at 3:37 p.m. December 3, 1963 (J.A. 136f) and continued until 6:04 p.m. that evening. They resumed at 10:00 a.m. December 4, 1962 and continued until 4:49 p.m. Up until that time the jury had indicated no apparent conflict and had not asked for any further instructions. Nevertheless the court, on its own initiative and over objection of all defendants, gave the so-called "Allen Charge." In approximately ten minutes the jury returned with a verdict against the corporate defendant and in favor of the individual defendants (J.A.136k). The trial court immediately recognized that this finding on the part of the jury was arbitrary and in conflict with the law which they had been given to apply. As a matter of fact, in view of the time elements involved, it is a fair assumption that the jury being unable to agree after prolonged and proper deliberation, arbitrarily decided to have the corporation pay appellee damages after the court instructed them that they should follow the views of the majority and return a verdict of some kind, if at all possible to do so. At this stage the trial court had no alternative but to declare a mistrial, first because it was obvious that the jury was bent on being arbitrary, and second, because the verdict announced was inconsistent with the instructions given.

There can be no question but that a trial court has the authority to send a jury back for further deliberation when their initial verdict is defective in form. It is equally well established that a trial court

may not attempt to change the substantive effect of any jury verdict by forcing further deliberation. Stivers v. George Washington University, U.S. App. D.C. F.2d (No. 16,999, decided June 13, 1963); Ass'n of Western Ry. v. Riss & Co., 112 U.S. App. D.C. 49, 299 F.2d 133 (1962); Craigie v. Firemen's Ins. Co., 191 F. Supp. 710, 714 (D. Minn. 1961), aff'd., 298 F.2d 457 (8th Cir. 1962). When the trial court sent the jury in this case for further deliberation, it did so on the basis of additional instructions which were given by the court without first providing counsel for the parties with an opportunity to submit and discuss proposals. The reinstruction was prejudicial to all defendants because it posed only two verdict possibilities: first, that the verdict should be against all three defendants; and, second, if the verdict is only against one defendant, it would have to be Muldrow. Any reinstruction given at this stage of the proceedings should have been equally balanced and the jury should have been told that if they concluded that the lighting was satisfactory and that Muldrow should, therefore, be exonerated; and that if they concluded that the stairwell was properly constructed and that the owners should, therefore, be exonerated; that it was their duty to exonerate all three defendants and find against the plaintiff. If the initial jury verdict was anything other than a blatant attempt to disregard the law and to unjustifiably hold the corporation liable, it must be taken to constitute a preliminary factual finding that the operator Muldrow had the lights turned on at the time of the accident because otherwise under the court's instructions the jury would have been obliged to find him liable. The initial verdict must also be taken as a factual finding that no hazardous condition existed at the time of the Toomeys' lease to Sinclair, because otherwise the jury would have been required to find the Toomeys' liable. Since there was no evidence that there was any change from the time of the Toomeys' lease to Sinclair, until the time of the accident, the necessary result of giving force to the preliminary factual finding of the jury would be to exonerate all three defendants. The trial court erred in failing to do so and its permitting the jury to deliberate further from 6:12 p.m. to 11:05 p.m. on December 4, 1962 and from 10:00 a.m. to 12:30 p.m. on December 5, 1962 amounted to coercion.

CONCLUSION

No proper basis for a recovery against this appellant was established either in law or by the evidence. Accordingly, for the reasons advanced herein, the judgment below should be reversed.

Respectfully submitted,

JOHN P. ARNESS

800 Colorado Building
Washington, D. C.

Attorney for Appellant.